1978 DIGEST INDEX
VOLUME 95

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VOLUME I

ACCOMMODATION PAPER

§26. Rights of an accommodation maker or indorser.

Louisiana (1977) Note was executed by the Big River Equipment Co. as maker and Donald J. Mills and Howard F. Carber as indorsers. The note was executed to secure a loan made by Big River to purchase insurance. After several premium installments became delinquent, the plaintiff-bank asked the insurance company to cancel the insurance policy and return to it the unearned premium. The insurer did so without notifying Big River or Carber or Mills. Nor did the bank notify those parties. The court found first that Mills and Carber were accommodation indorsers since neither received anything of value for his indorsement. The court held that there was sufficient consideration for the note. The note was simply an unsecured hand note and the accommodation indorsers were unconditionally bound by its terms. The insurance contract between Ward and Big River was not incorporated into the note. Fidelity Nat'l Bank of Baton Rouge v. Mills, La. App., 351 So. 2d 800, 95 B.L.J. 660.

§27. Agreement to indorse for accommodation.

Illinois (1972) Defendant purchased an insurance policy and executed and delivered a note for the amount of the annual premium. Plaintiff-manager of a branch office of the insurance company signed the note allegedly as an accommodation party and as defendant's surety. The note was "Endorsed without recourse" and signed "Duane S. Wolfram (Manager)." Plaintiff paid the note when defendant defaulted and had been unsuccessful in recovering the amount from defendant. The court held that plaintiff's capacity to sue was a question of fact, not of law, which was subject to proof by evidence beyond the face of the note. Parole evidence is admissible between the immediate parties where an agent signs in a representative capacity but does not name his principal. U.C.C. § 3-403(2)(a). Although a qualified indorsement absolves the indorser from liability on the instrument, it does not insulate him from liability based on a breach of warranties. U.C.C. § 3-417. The issue of liability presented a question of material fact which precluded summary judgment. Wolfram v. Halloway, Ill. App., 361 N.E.2d 587, 95 B.L.J. 279.

AGENTS

§57. Agent's authority to indorse.

Oklahoma (1977) Harry Burns, son of K.C. Burns, was an employee of Building Specialties, a company wholly owned by his father. Harry took a loan from a Tulsa bank. When he could not pay the loan, he took out another loan with Mercantile National Bank of Tulsa where he represented himself to be K.C. Burns, Jr. As security for the Mercantile loan, Harry offered to assign the proceeds of a subcontract awarded to Building Specialties on a general contract let to plaintiff Grimshaw. Prior to making the loan, officers of Mercantile contacted plaintiff to verify the existence of the subcontract. Plaintiff verified the same and stated it had a long and positive business relationship with Building Specialties and K.C. Burns. Mercantile notified plaintiff of the loan and required that all disbursals on the subcontract be payable jointly to Mercantile and Building Specialties. Plaintiff made disbursals to Harry in three different checks. All three checks were indorsed by Harry. A manufacturer of materials used on the subcontract contacted plaintiff, complaining that it had not been paid. Plaintiff sued defendant, the drawee bank, for wrongful payment of checks alleging an unauthorized payee indorsement. The

court found that the evidence tended to support defendant's theory that Harry had actual authority to indorse the checks. The same evidence was sufficient to raise a question of fact on whether Harry had apparent or implied authority, if not actual authority, to indorse the checks. There was also sufficient evidence to raise a question of fact as to whether there was any negligence on the part of plaintiff that contributed to any unauthorized indorsements by Harry. W.R. Grimshaw Co. v. First Nat'l Bank & Trust Co. of Tulsa, 563 P.2d 117, 95 B.L.J. 76.

§58. Personal liability of agent on note.

Georgia (1977) Where defendant signed a check which had the name of a corporation printed on it but contained no additional language setting forth a representative capacity on defendant's part, defendant was personally liable on the check. An authorized agent who signs his own name to an instrument is personally liable if the instrument names the person represented but does not show that the representative signed in a representative capacity. U.C.C. § 3-403(2). Seamon v. Acree, Ga. App., 236 S.E.2d 688, 95 B.L.J. 557.

ASSIGNMENTS

§94. Assignment of bill or note.

Texas (1977) Plaintiff brought suit against defendant on a promissory note executed by defendant payable to River City Machinery Co. and secured by a security agreement. Plaintiff pleaded that the note and security agreement were assigned to it by River City for valuable consideration, that defendant defaulted in payment of the note, that the collateral was sold at public auction, and that after demand defendant refused to pay the principal balance remaining on the note. The court found for plaintiff. By entering his general denial, defendant admitted the sufficiency of the assignment of the note to plaintiff. Gonzales v. American General Leasing & Fin. Corp., Tex. Civ. App., 555 S.W.2d 197, 95 B.L.J. 566.

ATTORNEY'S FEES

§108. Provision in instrument for attorney's fees held invalid.

Kentucky (1977) Plaintiff sought to collect on two promissory notes signed by defendants and secured by a real estate mortgage. Defendants failed to appear, and a default judgment was entered against them for the amount owed, including attorney's fees. The proceeds of the judicial sale of the property were sufficient to pay plaintiff, another mortgagee, and plaintiff's attorney's fees. Eleven days after the sale, defendants appeared for the first time and moved that attorney's fees be denied. The court granted defendants' motion on the ground that the provision in the promissory note calling for payment of attorney's fees violated public policy. Mammoth Cave Prod. Credit Ass'n v. Geralds, Ky. App., 551 S.W.2d 5, 95 B.L.J. 369.

§110. Liability of indorser for attorney's fees.

North Carolina (1977) Note was executed by corporate defendant and indorsed by individual defendants. The note provided that all parties thereto were jointly and severally liable for payment of the obligation. The court found the note to be in default. The individual defendants' argument that they were indorsers only and as such not liable for attorney's fees was rejected by the court. The note clearly extended the duty to pay attorney's fees to the indorsers since "all parties" was defined in the note to include indorsers. North Carolina law contemplates such liability on the part of indorsers by providing for notice to indors-

ers that the provision for attorney's fees shall be enforced in addition to the outstanding balance. N.C. Gen. Stat. § 6-21.2. Wachovia Bank & Trust Co. v. Peace Broadcasting Corp., N.C. App., 233 S.E. 2d 687, 95 B.L.J. 80.

§111. Recovery of attorney's fees.

Georgia (1977) Plaintiff sued defendants as co-makers on a promissory note. Defendants counterclaimed for malicious use of process, alleging that plaintiff had threatened foreclosure on a forged security deed. The unpaid balance of the note was $1,750, but the jury returned a verdict in favor of plaintiff for $875, or one-half that sum. The jury apparently, in effect, awarded the other $875 to defendants based on its consideration of the instructions on the counterclaim. The appellate court found, however, that plaintiff never instituted a foreclosure proceeding. Therefore the charge to the jury on malicious use of process was unauthorized and any charge on attorney's fees recoverable on the malicious use of process claim was also error. Since the award was detrimental to plaintiff, he was entitled to a new trial. Carter v. Jenkins, Ga. App., 237 S.E.2d 440, 95 B.L.J. 556.

New York (1977) In a construction proceeding, the attorney general's appearance on behalf of the charitable beneficiaries was mandated by law. N.Y. Est., Powers and Tr. Law § 8-1.1(f). The attorney general requested an award of legal fees commensurate with the fees received by other attorneys in the proceeding. N.Y.S.C.P.A. § 2302(6). The court held that the role of the attorney general in a construction proceeding is substantially different from that of the other parties. The state, through the attorney general, is in the position of *parens patriae* and represents the entire public in connection with all charities. *In re* Will of Dow, Surr. Ct., 396 N.Y.S.2d 979, 95 B.L.J. 190.

Texas (1977) Petitioner claimed it was reversible error for the trial court on remand to fail to award him reasonable attorney's fees as required by law. Tex. Code, Art. 5069, § 1.106. The language of the Supreme Court mandate, however, did not contemplate that the additional attorney's fee liability of any party except petitioner was remanded for determination. The trial court acted properly in refusing to award petitioner attorney's fees. When the Supreme Court remands a case and limits a subsequent trial to a particular issue, the trial court is restricted to determining only that issue. Wall v. East Texas Teachers Credit Union, Tex. Civ. App., 549 S.W.2d, 95 B.L.J. 275.

BANKING

§119. State control of banking business.

Delaware (1977) In an action on a promissory note secured by a second mortgage, defendants asserted as an affirmative defense violation of the Secondary Mortgage Loan Act, contending that the mortgage was unenforceable. The Act, however, does not cover "any banking institution . . . which is subject to any other law of this State or of the United States, regulating the power of such institution to engage in mortgage loan transactions." Secondary Mtg. Loan Act § 3101(2). The court held that plaintiff was within this exception, and was not required to show that it was subject to other forms of mortgage loan regulation. If it is determined that plaintiff is a banking institution, the Act is inapplicable. Kimmey v. Farmers Bank, 373 A.2d 569, 95 B.L.J. 460.

Florida (1977) Plaintiff-banks, bank directors, and bank stockholders challenged the authority of the state Comptroller to release to the public or to permit inspec-

tion by the public or the news media of records of the stock holdings and names of stockholders of plaintiff banks. The court noted that the literal meaning of the pertinent Florida statute gave the Comptroller the right to disclose the information to the public. Fla. Stat. § 658.10(1). However, the court found the statute to constitute a delegation of legislative authority in conflict with the U.S. Constitution and, to the extent of such conflict, invalid. Lewis v. Bank of Pasco County, 346 So. 2d 53, 95 B.L.J. 460.

Illinois (1977) An ordinance passed by the Chicago City Council permitted both state and federally chartered banks to perform banking functions at certain facilities and electronic banking machines in community offices located away from the bank's main offices. The Illinois Supreme Court found the ordinance unconstitutional. The state constitution provides that branch banking must be authorized by the greater of three-fifths of the members voting or a majority of the members elected of the General Assembly. Ill. Const. of 1970, Art. XIII, § 8. The Assembly has constitutionally permitted banks to establish "facilities," defined as places restricted to receiving deposits; cashing and issuing checks, drafts, and money orders; changing money; and receiving payments on existing indebtedness. The court found that the functions to be performed by the community offices and electronic banking machines under the city ordinance were of a banking character and exceeded the restricted activities permitted to "facilities" under Illinois law. People *ex rel.* Lignoul v. City of Chicago, 368 N.E.2d 100, 95 B.L.J. 651.

New Jersey (1977) Case remanded to Commissioner of Banking to enable him to revise a regulation which the court found too vague in its definition of the words "lender" and "solicit." Approved Fin. Co. v. Schaub, 373 A.2d 994, 95 B.L.J. 846.

South Dakota (1977) The State Banking Commission granted applicant-bank permission to move its main office and establish a branch at the site of its existing main office. Contestant, a competing bank, claimed there was no specific statutory authorization for the Commission to approve such a transfer. On appeal, the court decided that the Commission had authority to allow a change of location of a bank charter beyond the town or city for which the charter was originally issued. The Commission's authority is an implied power under the regulatory scheme. The court held further that movement of the main office of a bank to a new city should be considered by the Commission with the same care and standards as the issuance of a new charter, and the applicant should have the same burden of proof as an applicant for a new charter. *In re* Live Stock State Bank, 252 N.W.2d 227, 95 B.L.J. 82.

West Virginia (1977) A savings and loan association applied to the Board of Banking and Financial Institutions to change its name and change the nature of its business to general banking. The Board granted appellee association's application and appellant, a competing bank, sought review. The court remanded, holding that the Board's findings of fact and conclusions of law as set forth in its opinion were insufficient. Citizens Bank of Weirton v. West Va. Bd. of Banking & Fin. Institutions, W. Va. App., 233 S.E.2d 719, 95 B.L.J. 81.

§119.5. Federal control of banking business.

U.S. District Court, D. District of Columbia (1977) Comptroller granted banking association's application for permission to establish a branch bank, to which plain-

tiff-bank had filed a protest. Plaintiff tried to establish that applicant was a de facto branch of Michigan National Bank-Lansing and that the Lansing bank was the true parent bank. Applicant and Lansing are affiliates of Michigan National Corp., a bank holding company. Plaintiff contended that the application should be denied because the branch would be more than 25 miles from the parent and would be a branch of a branch bank. Mich. Banking Code § 171; 12 U.S.C. § 36(c). The court held that the Comptroller's decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Central State Bank v. Bloom, 440 F. Supp. 782, 95 B.L.J. 656.

U.S. District Court, N.D. Cal. (1977) Court held that Federal Home Loan banks are prohibited by the Federal Home Loan Act from engaging in the money order business, including, but not limited to, the functions of issuance of money order forms and other equipment, authorization of money order sales, acceptance of deposits of money order sales proceeds for purposes of acting as drawee for money order checks, processing of money order collection and payment, and other related activity. Central Bank v. Federal Home Loan Bank of San Francisco, 430 F. Supp. 1080, 95 B.L.J. 846.

U.S. District Court, S.D. Texas (1977) By letters to the boards of directors of plaintiff banks, the Comptroller of the Currency demanded that income from credit life insurance be credited to the banks, and not to bank officers, directors, or controlling stockholders. Plaintiff banks claimed that national banks were not authorized to act as insurance agents, so banks would be prohibited form receiving income generated by the sale of credit life insurance. 12 U.S.C. § 24(7). The court upheld the Comptroller's position. Officers, directors, and controlling owners have a fiduciary duty to make certain that the benefits accruing from a corporate opportunity inure to all of the owners of the enterprise. Obtaining credit life insurance does not constitute the business of insurance, and the banks and their employees are not insurance agents under either federal or state law. First Nat'l Bank of La Marque v. Smith, 346 F. Supp. 824, 95 B.L.J. 553.

§121. Discretion of authorities in issuing charter.

South Dakota (1977) State Banking Commission granted application to open and operate a new state bank. Existing banking institutions in the area appealed. Appellants challenged the need for a new bank, contending that the applicant failed to show that existing facilities were inadequate. The court upheld the Commission's decision. Adequacy of existing banking institutions is only one factor in the Commission's evaluation. Another factor is competition, and testimony indicated that a less than fully competitive situation prevailed among existing facilities. *In re* Application of Am. State Bank, Pierre, 254 N.W.2d 151, 95 B.L.J. 370.

§129. Banking powers—insurance business.

U.S. Court of Appeals, 5th Cir. (1977) The regulation of the Federal Reserve Board authorizing sale of property damage and liability insurance in connection with extensions of credit and other financial services is valid with regard to such sales by both bank and nonbank subsidiaries of bank holding companies. Reg. §§ 225.4(a)(9)(ii)(a), 225.4(a)(9)(ii)(b). The court found that providing property damage and liability insurance in connection with traditional banking functions is "closely related to banking." Alabama Ass'n of Ins. Agents v. Board of Govs. of Fed. Res. Sys., 558 F.2d 729, 95 B.L.J. 274.

BANKRUPTCY

§145. Priorities among creditors.

U.S. Court of Appeals, 9th Cir. (1977) Where creditors had an unperfected security interest in the collateral notes secured by trust deeds at the time the debtor filed a bankruptcy petition, the creditors' interest was subordinate to that of the trustee in bankruptcy. *In re* Staff Mortgage & Inv. Corp., 550 F.2d 1228, 95 B.L.J. 83.

§178. Liability of receiver.

U.S. District Court, E.D. Louisiana (1977) Plaintiff-lessor sued for accelerated rent due by reason of the insolvency of its lessee, the Republic Bank. The defendants were Republic, the FDIC as receiver, and the successor bank, First City Bank. The court held that a claim is not stated against the receiver of an insolvent bank unless the claim is due and owing at the time of insolvency. Any claim of plaintiff for accelerated rentals had not become fixed until after Republic was declared insolvent. Nor did First City assume the obligation for the accelerated rents by virtue of its purchase and assumption agreement with the FDIC. Plaintiff's only remedy was against the insolvent bank. Executive Office Centers, Inc. v. FDIC, 439 F. Supp. 828, 95 B.L.J. 564.

CHECKS

§277. Cashier's checks.

New York (1977) A bank depositor to whom a cashier's check had been issued and who had indorsed the check to the order of a third party could not stop payment on the check in the absence of a court order or an indemnification bond. Dziurak v. Chase Manhattan Bank, App. Div. 2d Dep't, 396 N.Y.S.2d 414, 95 B.L.J. 182.

§278.5. Stop-payment order.

Louisiana (1977) Plaintiff-insurer issued a check to defendant insured for damage to his car. When defendant had not received the check five days later, plaintiff issued a stop-payment order and drew another check payable to defendant and his attorney. After plaintiff informed defendant that another check would be issued, defendant received the first check. Defendant indorsed the first check to AAA Body and Fender Work in payment for repair work. AAA presented the check for payment, but it was not honored due to the stop payment. AAA informed plaintiff insurer of the dishonor, and the latter issued a third check payable to AAA. It then requested defendant's attorney to return the second check. The attorney refused, claiming that the repair work was faulty and that plaintiff should not have paid AAA. The court held that the insurer was entitled to recover the amount of one of the checks. The first check issued by plaintiff was a valid negotiable instrument. At the time defendant negotiated this check, AAA was unaware of the stop-payment order, and became a holder in due course. As such, AAA had a right to enforce payment against either defendant as indorser or plaintiff as drawer. La. Rev. Stat. §§ 7:30, 7:50, 7:57. Any dispute between defendant and AAA as to the quality of the repairs had no bearing on plaintiff's duty to AAA as holder in due course of the check. Aetna Cas. & Sur. Co. v. Melancon, La. App., 348 So. 2d 717, 95 B.L.J. 468.

New York (1977) A bank depositor to whom a cashier's check had been issued and who had indorsed the check to the order of a third party could not stop payment on the check in the absence of a court order or an indemnification bond. Dziurak v. Chase Manhattan Bank, App. Div. 2d Dep't, 396 N.Y.S.2d 414, 95 B.L.J. 182.

COLLECTIONS

§336.5. Automated collections.

Georgia (1977) Payor bank could not refuse to debit its customer's account for a deficiency owed to the collecting bank which had miscoded the check in question. First Nat'l Bank & Trust Co. v. Georgia R.R. Bank & Trust Co., 235 S.E. 2d 1, 95 B.L.J. 375.

CONSIDERATION

§340. Presumption of consideration.

North Carolina (1977) Where a promissory note executed by defendant was a negotiable instrument under seal, there was a presumption that the note was given for good consideration. Plaintiff's evidence bolstered this presumption in that it showed that the parties entered into a contract for the delivery of modular motel rooms by plaintiff to defendant. The contract called for defendant to pay a delivery charge for each room, and plaintiff was paid the full contract price. However, when it submitted a bill for shipping charges, there were not enough project funds available from the lender to pay the bill. Defendant thereafter executed the note in question as payment for the unpaid part of the shipping costs. Since defendant failed to adduce evidence sufficient to rebut the presumption of consideration, the court held that the evidence supported the trial court's finding in favor of plaintiff. Chesson v. Gardner, N.C. App., 233 S.E.2d 668, 95 B.L.J. 84.

§342. Instances of sufficient consideration.

Georgia (1977) Plaintiff and defendant entered into a corporate business venture. Relations deteriorated and resulted in a sale of plaintiff's interest in the business to defendant. At the time of the sale, defendant executed a promissory note but refused to pay it, when due. Defendant alleged that there was a failure of consideration and that the note was founded on a mistake of fact. He also claimed that plaintiff induced him to sign the note by fraud, deceit, and trickery. Although defendant admitted that he possessed the corporation's business records before signing the note, he claimed that plaintiff misled him as to the accounts payable to the corporation. The testimony of plaintiff and defendant differed as to when and which documents were delivered and what they represented. The court noted that the jury is the final arbiter as to credibility. There was sufficient evidence to support its verdict in favor of plaintiff. The court refused to rule on defendant's enumerations of error since he had not objected to the allegedly erroneous charges at the trial court level. Crider v. Scoma, Ga. App., 236 S.E.2d 150, 95 B.L.J. 464.

§343. Commercial Paper.

Texas (1977) Where parties entered into an oral agreement to extend the time for payment of a promissory note, the statute of limitations did not start to run until the expiration of the period orally agreed upon. An oral contract of extension of a promissory note is valid and binding if the new contract is supported by valid consideration. Maceo v. Doig, 558 S.W.2d 117, 95 B.L.J. 846.

CORPORATIONS

§368. Powers of corporations.

Texas (1977) The chairman of the board of directors of a bank acted with authority in dismissing appellant from his position as executive vice-president and cashier. His action was ratified by the members of the board at a subsequent meeting. Minutes of that meeting stating that a discussion of the specifics of the dismissal followed the approval of the

chairman's actions provided a sufficient showing of knowledge by the board of the pertinent facts. Jackson v. Gray, 558 S.W.2d 138, 95 B.L.J. 847.

§370. Foreign corporations.

U.S. District Court, W.D. Ark. (1977) Where a contract covered a transaction solely in interstate commerce, the claim by defendant that the contract was void ab initio because plaintiff failed to comply with Arkansas law requiring a foreign corporation to file a copy of its charter with the Secretary of State was not a valid defense. Unlaub Co. v. Sexton, 427 F. Supp. 1360, 95 B.L.J. 84.

§371. Authority of corporate officers.

Texas (1977) The chairman of a bank's board of directors was not acting within the scope of his authority when he agreed to sell plaintiff shares of stock and promised him a seat on the board. American Bank & Trust Co. v. Freeman, 560 S.W.2d 444, 95 B.L.J. 847.

DEBT ADJUSTING AND BUDGET PLANNING

§380.5. In general.

Ohio (1977) Buyer who prepaid loan seventeen days after payment of the March installment but fourteen days before the April installment was due was not entitled to a refund credit for the March-April period. Webster v. International Harvester Credit Corp., 367 N.E. 2d 924, 95 B.L.J. 558.

DEPOSITS

§429.3. Deposits in two names—Kansas.

Kansas (1977) Wife could not recover funds taken from a bank account or a mobile home and bring them into decedent's estate where the bank account was a joint account with right of survivorship in the names of decedent and his sister, and where decedent had made a valid gift of the mobile home to his sister. *In re* Estate of Powell, 567 P.2d 872, 95 B.L.J. 378.

§446. Deposits in two names—Washington.

Washington (1977) Where survivor of a joint account with right of survivorship had exerted undue influence on the deceased joint tenant, the latter's son was entitled to the funds in the joint account. Doty v. Anderson, 563 P.2d 1307, 95 B.L.J. 191.

DURESS

§476. Duress as defense to note.

Florida (1977) Where wife was not coerced into co-signing note with her now-deceased husband, she was fully liable on the note. Payee-plaintiff had advanced $15,000, unsecured and without a writing, to defendant husband to invest in real estate. Instead, the husband converted the money to make payments on his farm. Plaintiff discovered this, demanded repayment, and threatened to take the matter to the state attorney. Finally, defendant-husband and his wife signed a promissory note. The wife testified that she signed in order to prevent her husband from going to jail. Plaintiff then brought this action on the unpaid note. Summary judgment was granted against the husband's estate. The wife argued that under Florida law, a wife may avoid a conveyance obtained by express or implied threats of imprisonment of her husband. However, duress requires a showing that the act of the party compelling obedience of another is unlawful or wrongful. Here, the wife offered no evidence that plaintiff's intimations were illegal. Norris v. Stewart, Fla. App., 350 So. 2d 31, 95 B.L.J. 371.

EVIDENCE

§478. Admissibility of evidence.

Alabama (1977) Trial court properly refused to admit into evidence a loan guarantee agreement signed by defendants where no connection was shown between the installment note in question and the loan guarantee agreement. First State Bank of Albertville v. Duvall, 345 So. 2d 1377, 95 B.L.J. 460.

EXECUTORS, ADMINISTRATORS AND TRUSTEES

§482. Appointment.

California (1977) As between a disinherited spouse and decedent's children, the nominee of the latter was entitled to letters of administration with the will annexed. *In re* Estate of Kaseroff, 562 P.2d 325, 95 B.L.J. 284.

§488. Removal of executor or administrator.

Arkansas (1977) Court removed trustee from his position and appointed bank as sole trustee where trustee purchased unproductive trust property without any authority, failed to comply with orders of the lower court for a number of years, refused to account to the beneficiaries after being ordered by the court to do so, and favored his children as remaindermen over his former wife as income beneficiary. Riegler v. Riegler, 553 S.W.2d 37, 95 B.L.J. 285.

§492. Compensation.

Missouri (1977) Executor who was found guilty of misconduct sufficient to justify his removal as executor was not entitled to compensation and was required to return to the estate such compensation as he had been paid. The attorney-executor had been disbarred. *In re* Estate of Gould, Mo. App., 547 S.W.2d 863, 95 B.L.J. 92.

New York (1977) Trustee was allowed to take annual commission on value of real estate held in the trust where he performed definite duties dealing with the real property. Since decedent died before August 31, 1956, the Surrogate's Court Procedure Act applied. The court found that the fiduciary managed the realty as part of an asset of the trust and properly took commissions as authorized by law. N.Y. Surr. Ct. Proc. Act § 2308(7) (McKinney 1967). The trustee did not seek any receiving or paying-out commissions but did take annual principal commissions. N.Y. Surr. Ct. Proc. Act § 2308(3) (McKinney 1967). *In re Will* of Hamilton, Surr. Ct. Nassau County, 398 N.Y.S.2d 231, 95 B.L.J. 479.

§494. Powers and duties.

Kansas (1977) A contract between buyer and nonresident executor of the estate with power of sale was valid even though it was executed prior to probate of the estate in Kansas. Oglevie v. Stasser, Kan. App., 564 P.2d 563, 95 B.L.J. 191.

Pennsylvania (1977) In the absence of a contrary direction by the settlor, both ordinary and extraordinary stock dividends received after 1945 are allocable to principal. An inter vivos trust had been created by settlor prior to 1945. This decision dealt with only small stock dividends received by the trustee from May 3, 1945 through September 30, 1963. *In re* Estate of Tyler, 377 A.2d 157, 95 B.L.J. 474.

§495. Collection of assets of estate.

Georgia (1977) Administrator of the estate of mortgage holder was entitled to receive proceeds of mortgage where deed transferring decedent's interest in mortgage to a third party was invalidated by lack of mental capacity. Antipas v. Hudgens, 239 S.E.2d 373, 95 B.L.J. 569.

§513. Investment under provision in will or trust agreement.

U.S. District Court, N.D. Ill. (1977) A suit instituted by beneficiaries of a trust to remove the trustee and for monetary damages due to the trustee's breach of fiduciary duty was barred by the doctrine of res judicata because the parties had litigated the same cause of action previously in state court. Himel v. Continental Ill. Nat'l Bank & Trust Co., 430 F. Supp. 651, 95 B.L.J. 191.

Montana (1977) Court held that ex-husband's accounting of trust funds set aside by him for his two children was proper and that half the fund must be distributed to his child who became eighteen years old. Coffee v. Wolfe, 567 P.2d 44, 95 B.L.J. 289.

§523. Revocation of trust.

New York (1977) Court disregarded the express intent of the testatrix that no substitute trustee be appointed in the event trustee predeceased her, or failed to qualify, or became incapacitated during administration of the estate since to do otherwise would have caused the termination of the trust. *In re* Estate of Jones, 397 N.Y.S.2d 558, 95 B.L.J. 289.

§529. Life insurance trust.

Georgia (1978) Court, in a divorce proceeding, refused to find that wife held one-half of the marital residence and acreage in trust for her husband where title was in her name as the result of a gift and a conveyance to her by members of her family. The jury granted the husband one-half of the other property owned by the parties. Crymes v. Crymes, 242 S.E.2d 30, 95 B.L.J. 859.

§529.5. Constructive trust.

Colorado (1977) A constructive trust was imposed on real property and bank accounts held by defendant where the court found that a confidential relationship existed between the defendant and her deceased mother. Weeks v. Esch, 568 P. 2d 494, 95 B.L.J. 475.

Iowa (1977) Defendant owned a farm which she conveyed to her sister, reserving a life estate to herself. The conveyance was precipitated by an imminent foreclosure on the property. Eleven years later, defendant convinced her son and daughter-in-law, the plaintiffs, to buy back the farm. Plaintiffs received a deed from defendant's sister. Five years later, plaintiffs conveyed by warranty deed a so-called life estate in the farm to defendant. Defendant served plaintiffs with a notice to quit, and they moved out of the house, although they continued to farm the property and pay all the taxes, insurance, and other expenses. Plaintiffs testified that they had intended to convey only a joint right of occupancy to defendant so as to provide her with a place to live should her son, the plaintiff, die. The conveyance by deed of a life estate was a mistake. Defendant claimed that either a resulting trust or a constructive trust was created in her favor. However, there was no evidence that defendant paid the purchase price, and so she failed to establish the existence of a resulting trust. The court reformed the deed granting a life estate to defendant by substituting a joint right of occupancy in defendant for the life estate. The grantor in a voluntary conveyance will be aided by the court even if the mistake is unilateral and not mutual. Westcott v. Westcott, 259 N.W.2d 545, 95 B.L.J. 666.

New York (1977) Court upheld finding that certain real property was held in a constructive trust for former husband by former wife. A deed executed by plaintiff-husband to himself and defendant, his former wife, as tenants by the entirety, was deemed null and void. The court also found plaintiff-husband to be the owner

of, and entitled to immediate possession of, various items of personal property placed in storage by defendant or still in her possession. Plaintiff presented sufficient evidence to allow the trial court to grant him the equitable and legal remedies he sought against his former spouse. The constructive trust as to plaintiff's interest in the real property and the money judgment awarded were necessary to redress the wrongs done to plaintiff by defendant through violation of the confidential relationship of marriage. Rabinowitz v. Rabinowitz, App. Div. 2d Dep't, 395 N.Y.S.2d 242, 95 B.L.J. 380.

New York (1977) Constructive trust was imposed on life insurance proceeds received by second wife where decedent had agreed in separation agreement, later incorporated into a divorce decree, to continue in effect life insurance policies naming his first wife as beneficiary. Simonds v. Simonds, App. Div. 4th Dep't, 396 N.Y.S.2d 547, 95 B.L.J. 286.

South Carolina (1978) Where wife contributed materially to the financial success of her family and the acquisition of property by her husband, she was entitled to the equitable ownership of a portion of the properties held by her husband at their divorce. Wilson v. Wilson, 241 S.E. 2d 566, 95 B.L.J. 858.

Texas (1977) Defendant-construction company conveyed two lots, numbered 10 and 13, to plaintiffs. The lots were not contiguous, and plaintiffs made an agreement with the president of defendant-corporation, Owens, to trade their lot 13 for lot 9, adjoining lot 10. Plaintiffs delivered the deed to lot 13 to Owens, who later mailed a deed to lot 9 to plaintiffs, signed by him as president of grantor corporation. The plaintiffs failed to record the deed and left the area. A visit to their property four years later disclosed that the lot was in possession of Harlan A. Winter, who claimed the lot under a deed from defendant-corporation executed by a trustee. It was clear that Winter took the deed without knowledge of plaintiffs' claim. The court imposed a constructive trust on the proceeds of the sale of the property by defendant to Winter, even though no fiduciary relationship existed between plaintiffs and defendant. The court also held that the two-year statute of limitations did not apply. In actions to establish a constructive trust based on fraud, the four-year statute of limitations applies. Austin Lake Estates, Inc. v. Meyer, Tex. Civ. App., 557 S.W.2d 380, 95 B.L.J. 668.

FEDERAL DEPOSIT INSURANCE CORPORATION

§538. Membership.

U.S. District Court, D. Nevada (1977) Defendant-bank had transferred realty to plaintiffs to be developed by them. Plaintiffs alleged that at the bank's suggestion they accepted a deed on the property, executed a note secured by a deed of trust on the property, and agreed to develop the property. Plaintiffs further alleged an oral agreement that in the event the property could not be developed prior to the built-in interest being deleted by payments on the note, plaintiffs could deed the property back to the bank and the note, deed of trust, and guarantees would be canceled. Subsequently, plaintiffs were unable to develop the property in time and the bank officers informed them that the transaction was canceled. The FDIC, thereafter appointed receiver of defendant-bank, claimed that the note was due and payable and that any agreement with its predecessor was not binding on it. The court held that the FDIC could ignore oral agreements that tend to diminish or defeat its right, title, or interest in any asset acquired by it in a purchase and assumption agreement. 12 U.S.C. § 1823(e). Dasco, Inc. v. American City

Bank & Trust Co., 429 F. Supp. 767, 95 B.L.J. 182.

FEDERAL RESERVE BANKS

§539.1. Powers of Federal Reserve Board.

U.S. District Court, D. District of Columbia (1977) The Board of Governors of the Federal Reserve System approved the application of a bank holding company to acquire all of the stock of a proposed new national bank over the objection of an existing bank in the area. Farmers & Merchants Bank of Las Cruces v. Board of Govs. of Fed. Res. Sys., 567 F.2d 1084, 95 B.L.J. 848.

FORGED PAPER

§550. Liability of bank to depositor where bank pays check bearing forged signature.

Connecticut (1977) Newington Associates issued a check drawn on drawee bank and payable to both Air Conditioning Associates (ACA) and the plaintiff. ACA indorsed the check in both names and deposited it in depositary bank. At no time did plaintiff authorize ACA or any of its agents to indorse plaintiff's name on the check. The check was payable to the order of "Air Conditioning Equipment Assoc. Distributors." The court found that Newington intended ACA and plaintiff to be joint payees of the check. The absence of the word "and" was not controlling. It also found that since the check was payable to two persons and was not payable in the alternative, it could be negotiated only by both of them. The unauthorized indorsement of plaintiff was a forgery and was inoperative as plaintiff's signature. U.C.C. § 3-404. Therefore, depositary bank's collection of the proceeds constituted a conversion. Payment of the checks on the forged indorsement by drawee bank also constituted a specific act of conversion. U.C.C. § 3-419. Equipment Distributors v. Charter Oak Bank & Trust Co., 379 A.2d 682, 95 B.L.J. 655.

§580. Drawee held not liable.

U.S. Court of Appeals, 5th Cir. (1977) Plaintiff utilized a facsimile signature machine for signing checks. Plaintiff adopted a corporate resolution authorizing and directing four banks to honor all checks, drafts, or other orders of payment of money drawn in plaintiff's name on its regular accounts bearing the facsimile signature. Plaintiff thereafter received notice from the banks that its accounts were overdrawn. An investigation disclosed seventeen forged checks to two corporations of which plaintiff had no knowledge. The court of appeals upheld the district court's decision stating that plaintiff suffered a forged check loss and that for its own business reasons it had largely assumed the risk of such loss by using the facsimile signature machine and passing the resolution authorizing the banks to honor the signature. Plaintiff claimed that the forger's failure to indorse in a representative capacity made the case one of unauthorized indorsement and entitled plaintiff to recover from any of defendant-banks on a strict liability basis. The court rejected this argument. An indorser's failure to sign a forged check in a representative capacity provides no basis for imposition of improper payment, warranty, or conversion liability. Perini Corp. v. First Nat'l Bank of Habersham County, 553 F.2d 398, 95 B.L.J. 178.

§594. Liability of drawer to purchaser of instrument with forged indorsement.

Ohio (1976) Where a draft made payable to three parties was paid over the forged indorsement of one of the payees, the drawer's debt as to the payee whose indorsement was forged was not discharged and payment of the instrument consti-

tuted a conversion as to that payee for which the drawer-drawee was liable. The drawer-drawee was an insurance company. The draft in question was payable to plaintiff and two others as land contract vendor and vendees, respectively. It was conceded that plaintiff's indorsement was authorized and that she received no part of the proceeds of the draft. An instrument payable to the order of two or more persons if not in the alternative is payable to all of them and may be negotiated, discharged, or enforced only by all of them. Ohio Rev. Code Ann. § 1303.15. Here, the draft was not payable in the alternative and thus was neither negotiated nor discharged by the unauthorized and forged indorsement. As defendant was both drawer and drawee, it was obligated to make payment to the named payees therein. An instrument is converted when it is paid on a forged indorsement. Ohio Rev. Code Ann. § 1303.55. Here, the statutory liability of defendant was absolute. By paying on the forged indorsement, defendant converted the draft and is liable for damages. Lee v. Skidmore, Ohio App., 361 N.E.2d 499, 95 B.L.J. 85.

§596. Proving forged indorsement.

Ohio (1976) Plaintiff who brought an action in conversion resulting from the payment of an instrument over a forged indorsement did not have the burden of overcoming the statutory presumption that the indorsement was genuine and authorized. The law states that unless specifically denied in the pleadings, each signature on an instrument is admitted. When the effectiveness of a signature is in issue, the burden of establishing it is on the party claiming under the signature, but the signature is presumed to be genuine or authorized. U.C.C. § 3-307. Although defendants claimed that plaintiff failed to overcome this presumption, the court disagreed. It held that the statute was not applicable to this case because it only concerned defenses when the validity of a signature is at issue. Here, all the parties conceded that the plaintiff's signature was not genuine. The statute cannot be used to unnecessarily burden a party bringing an action on a forged indorsement. Petty v. First Nat'l Bank of Akron, Ohio App., 363 N.E.2d 599, 95 B.L.J. 371.

FRAUD

§598.1. Debt not dischargeable because of fraud.

Missouri (1977) Plaintiffs contracted for work to be done on their home by defendant-company. They claimed that the work was never completed and any work done was unprofessional, and they refused to complete payment for the work. Defendants had taken plaintiffs' copy of the original contract and substituted a purported sales contract that differed substantially from the original and that plaintiffs denied signing. Defendants instituted foreclosure proceedings against plaintiffs' property without any notice to plaintiffs. Plaintiffs paid the necessary sums to prevent foreclosure but thereafter defendants published notice of foreclosure. Neither individual defendant took the stand, nor did they present expert testimony that the signatures on the note and deed of trust were those of plaintiffs. All the essential elements of fraud were proven. Fraud can be shown by circumstantial evidence. The representation by defendants that the note and deed of trust had been signed by plaintiffs satisfied the requirement that there be a misrepresentation of a material fact. Knoesel v. Fiber-Lum, Inc., Mo. App., 553 S.W.2d 72, 95 B.L.J. 278.

New York (1977) Defense of fraud in the inducement was rejected as a matter of law where defendants failed to allege justifiable reliance on the bank's alleged misrepresentation. The court found that the

terms of the note and guarantee were so completely inconsistent with the alleged oral representation that it strained credulity to believe that defendants in fact relied on the alleged representation although they signed the guarantees. Merchants Nat'l Bank & Trust Co. of Syracuse v. Syracuse Eagles Hockey Club Corp., App. Div. 4th Dep't, 397 N.Y.S.2d 38, 95 B.L.J. 281.

§598.5. Intent to defraud.

Georgia (1977) Plaintiff could not establish that defendant held property in constructive trust for him because no evidence was presented that defendant's promise to reconvey, when made, was fraudulent. Plaintiff, the former husband of defendant, conveyed his one-half interest in certain property to defendant. He contended that the sole purpose of the conveyance was to have defendant hold title to his interest and that said interest was to be reconveyed upon his request. Plaintiff alleged that despite several requests, defendant had refused to reconvey the property and that because of these circumstances the interest was impressed with a trust in his favor. Defendant asserted that the only reason plaintiff conveyed his interest to her was to defraud his creditors. The court held that inceptive fraud must be shown to establish a constructive trust. The promise to reconvey, when made, must be fraudulent. Also, averments in the pleadings of fraud must be stated with particularity. Ga. Code Ann. § 81A-109(b). Plaintiff neither alleged fraud in his complaint nor submitted evidence of fraud at the trial. Parks v. Parks, 239 S.E.2d 334, 95 B.L.J. 569.

GIFTS

§600. Delivery is essential to the validity of a gift.

Indiana (1978) Decedent was held incompetent to make an inter vivos gift to his daughter by a previous marriage. There had been no delivery of funds to the daughter, but instead the funds were entrusted to decedent's brother with the intention of making a gift at a future time to the daughter. In addition, decedent did not have sufficient mental capacity to make a gift because his desire to make the gift was partially motivated by delusions that his second wife was unfaithful. *In re* Guardianship of Fowler, 371 N.E.2d 1345, 95 B.L.J. 859.

Missouri (1977) Plaintiff-administratrix of decedent's estate sought discovery of assets of the estate from defendant, decedent's niece. The court found that instructions given by decedent to his niece just prior to his death to go to his house and take possession of certain designated property was sufficient delivery to establish a gift causa mortis. Defendant proved the gift by clear, cogent, and convincing evidence. It is not necessary that there be a manual delivery or an actual tradition from hand to hand to create a gift. Constructive delivery such as occurred here is sufficient. Clark v. O'Neal, Mo. App., 555 S.W.2d 68, 95 B.L.J. 571.

Tennessee (1977) Mother wrote to her daughter to come immediately to "tie this home up so no one can take it away from you." The daughter traveled from her home in Texas to Tennessee and arranged with an attorney to prepare a quitclaim deed. She also arranged for a notary public to take the acknowledgment. Eleven days after the deed was executed, the mother sued for rescission. The court refused to rescind, finding no evidence of fraud, misrepresentation, or undue influence. It also found that the relationship of the parties did not per se give rise to a presumption of undue influence. The normal relationship between a mentally competent parent and an adult child is not per se confidential and raises no presumption of invalidity of a gift from one to the

other. Kelly v. Allen, 558 S.W.2d 845, 95 B.L.J. 671.

§600.5. Confidential relationship of donee of gift.

New York (1977) Decedent executed a donation to defendant-nursing home at the age of 85, after she had suffered a stroke. Two withdrawal slips on decedent's savings account were not signed with her usual signature, but with a mark, and were procured by defendant's agents. The court set aside the donation. Only slight evidence is required to shift to the donee the burden of proving by clear and satisfactory evidence that any transfer of property was made freely and voluntarily by the donor where the decedent and defendant were acting from unequal positions. Moreover, the relationship between decedent and defendant was held to be a confidential one. Gordon v. Bialystoker Center & Bikur Cholem, Inc., App. Div. 2d Dep't, 396 N.Y.S.2d 896, 95 B.L.J. 193.

§602. Transaction held valid as gift causa mortis.

Florida (1977) Court denied plaintiffs' request to set aside certain gifts made by their father to defendant, their brother, finding that no undue influence existed. Freedman v. Freedman, Fla. App., 345 So. 2d 834, 95 B.L.J. 97.

Louisiana (1977) Held that language of written acceptance of donor's gift was sufficient to satisfy statute requiring that acceptance be in "precise terms." The executrix of the donor's estate sought to annul an inter vivos gift by the donor to his nephew on the ground of an invalid acceptance. The gift consisted of an interest in certain real property and was conveyed to the nephew in consideration of the love and affection that donor bore for his nephew. The nephew accepted the gift in writing signed by him and notarized. Both the donation and the acceptance were prepared by the same law firm. The donee's father filed both authentic acts, the donation and the acceptance, for recordation on the same day. The clerk of the court assigned them both the same file number and recorded them simultaneously. The donor died shortly thereafter. The executrix alleged that the donee failed to accept the donation in precise terms as required by Louisiana law. La. Civ. Code, Art. 1540. Under this section, a donee is obligated to use express, formal, and unconditional language in his acceptance. An explicit acceptance is required and tacit or inferred acceptance will not suffice. Here, the language of the acceptance was found to conform with the statute. It was also held that the failure of the acceptance instrument to describe the property donated was insignificant. Rutherford v. Rutherford, 346 So. 2d 669, 95 B.L.J. 182.

Louisiana (1978) Two gifts inter vivos of immovable property by husband to former wife were held null and void where deeds were not executed before a notary public and two witnesses, even though the notary and witnesses signed a day or two after the husband executed the deed and all parties admitted the genuineness of the signatures. Sarpy v. Sarpy, 354 So. 2d 572, 95 B.L.J. 860.

Oklahoma (1977) Where decedent retained possession and control over two certificates of deposit, they were part of his estate and were not valid inter vivos gifts. Courtney v. First Nat'l Bank, 569 P.2d 458, 95 B.L.J. 572.

§606. Gifts of bank deposits.

Nebraska (1977) Decedent went to a bank for the purpose of changing her savings account to the names of herself and her daughter jointly. A delay occurred, caused solely by the bank, and decedent died a day before the actual transfer of the funds. It was held a completed gift

was made. Rorabaugh v. Garvis, 252 N.W.2d 161, 95 B.L.J. 285.

New York (1977) Decedent executed a donation to defendant-nursing home at the age of 85, after she had suffered a stroke. Two withdrawal slips on decedent's savings account were not signed with her usual signature, but with a mark, and were procured by defendant's agents. The court set aside the donation. Only slight evidence is required to shift to the donee the burden of proving by clear and satisfactory evidence that any transfer of property was made freely and voluntarily by the donor where the decedent and defendant were acting from unequal positions. Moreover, the relationship between decedent and defendant was held to be a confidential one. Gordon v. Bialystoker Center & Bikur Cholem, Inc., App. Div. 2d Dep't, 396 N.Y.S.2d 896, 95 B.L.J. 193.

§607. Transactions held valid as gifts of deposits.

Florida (1977) Court denied plaintiffs' request to set aside certain gifts made by their father to defendant, their brother, finding that no undue influence existed. Freedman v. Freedman, Fla. App., 345 So. 2d 834, 95 B.L.J. 97.

GUARANTY

§612. Guaranty in general.

South Carolina (1977) Plaintiff executed a lease with defendant David Jones Sales and in connection therewith secured a personal guaranty of payment of the lease from the individual defendants. The terms of the guaranty provided consensual personal jurisdiction in the New York courts. Plaintiff sought to enforce a New York default judgment rendered against defendants. One of the individual defendants, Evelyn B. Jones, appeared and answered by general denial. In this appeal, defendant admitted that in her answer she neither alleged forgery nor specifically denied her signature on the guaranty. The court held that a general denial will not raise the issue of genuineness of a signature on an instrument. U.C.C. § 3-307(1). Defendant's assertion that forgery was not required to be affirmatively pleaded since she was contesting the jurisdiction of the New York courts was rejected. National Equip., Ltd. v. David Jones Sales, 235 S.E.2d 125, 95 B.L.J. 374.

Texas (1977) Where a guaranty agreement was absolute and unconditional, it bound the guarantor on all terms of the note, including the provision concerning place of payment and venue. The bank sued the corporate maker for payment and the guarantors on their written guaranty contract. The action was brought in Cameron County, Tex., the county where the note was expressly made payable by its terms. The guarantor filed a plea of privilege to be sued in the county of his domicile. Texas law provides that if a person has contracted in writing to perform an obligation in a particular county, expressly naming such county, suit may be brought against him in either such county or where defendant has his domicile. Tex. Stat. Ann., Art. 1995, § 5(a). The guarantor's argument that the statute was inapplicable because the guaranty contract did not expressly name Cameron County as the place of performance, was rejected by the court. A note and its absolute guaranty cannot be considered to be separate and distinct. The guaranty agreement includes all of the note's terms when it is absolute and unconditional, as here. Thus, if the note expressly states it is payable in a certain place, then the contract of guaranty must also be said to provide expressly for the place of its performance. Since the note here stated it was payable in Cameron County, the contract of guaranty was deemed to name that county as the place of performance. Therefore,

venue was sustainable in the suit brought against the guarantor in that county. Hopkins v. First Nat'l Bank at Brownsville, 551 S.W.2d 343, 95 B.L.J. 368.

§616. Construction of contract of guaranty.

Florida (1977) No abuse of discretion was found where trial court granted plaintiff-bank a deficiency judgment in the amount of $192,952.46 following foreclosure against defendant as guarantor of an indebtedness of a co-defendant. Defendant-guarantor argued that the parties intended the guaranties to cover only personalty and not real estate mortgages, but the court disagreed. Greenwell v. Bank of Perrine, Fla. App., 344 So. 2d 623, 95 B.L.J. 277.

Florida (1977) Lease, which was the subject of the action and executed by the parties thereto, was admissible in evidence even though it was not executed by the bank's president or any vice-president or chief executive officer in the presence of two subscribing witnesses. Fla. Stat. §§ 692.01, 689.01. Plaintiff-bank, as landlord, sued defendants individually and as partners doing business as Computer Institute of North America, Inc. for rentals and the cost of leasehold improvements under a written lease. Plaintiff also contended that defendants were liable as guarantors of the corporation's obligations pursuant to a guarantee instrument executed six weeks after the date of the lease. The lease was purportedly executed in behalf of the bank by an assistant vice-president without subscribing witnesses. The bank offered no proof that it had authorized its assistant vice-president to execute a lease in its name. The court held that an assistant vice-president is not a vice-president whose presumed authority to execute a lease for a bank is derived from Section 692.01. However, the lease was admissible in evidence to show the unenforceable obligations of Computer Institute which defendants allegedly guaranteed. By refusing to admit the lease into evidence, the trial court foreclosed plaintiff's pleaded theory of liability on the guaranty. There are circumstances in which a guaranty agreement is enforceable against a party to secure performance of obligations under a prior instrument which is itself unenforceable. Florida First Nat'l Bank v. Dent, Fla. App., 350 So. 2d 481, 95 B.L.J. 562.

Illinois (1977) Public relations firm was entitled to recover against defendant-attorney on his guaranty where the firm continued to provide services for a corporation after it failed to pay its monthly bills only because of defendant's guaranty. Herbert H. Rozoff Ass'n v. Puroty Corp., 371 N.E.2d 976, 95 B.L.J. 849.

Illinois (1977) Where defendant's affidavit in support of a motion to open a judgment by confession did not establish the meritorious defense of failure of consideration, the court acted within its authority in denying the motion. Malone v. Marks, 371 N.E.2d 204, 95 B.L.J. 850.

Nebraska (1977) Defendants, who executed a separate guaranty agreement to induce a landlord to make a lease, were liable on the guaranty. The agreement guaranteed the payment of the monthly rentals and the performance of all obligations of the tenant under the lease. The tenant closed its operations because of continued financial losses, and, when it vacated the premises, it left its trade equipment, which was subject to a statutory lien for rent. Defendants sent plaintiff a bill of sale and release. Although defendants executed the release, plaintiff never did. Defendants' claim that plaintiff verbally agreed to release them as consideration for the execution of the bill of sale was rejected by the court. The court specifically found that the bill of sale was

offered by defendants in consideration of the release, but that offer was never accepted. McDowell Road Ass'n v. Barnes, 252 N.W.2d 151, 95 B.L.J. 184.

New York (1977) Where a defendant-guarantor agreed to be held liable for corporation's obligations "without deduction by reason of setoff, defense or counterclaim," he had waived his right to assert any defenses available to his principal. Plaintiff, a factor, brought action on the written guaranty of the defendants who were the principal officers and stockholders of the corporate debtor. Shortly after the guaranty was signed, the corporation was adjudged a bankrupt. One of the defendant-guarantors died, and the court held that the action against him did not abate on his death. It could be maintained against his executors, especially since, by its terms, the guaranty was binding on defendant, his heirs, executors, administrators, and assigns. Thus, the claims against the deceased defendant were severed and stayed pending the appointment of his personal representative. The court proceeded on the merits against the other defendant-guarantor and found him liable. He had waived his right to assert any defenses available to his corporate principal and therefore could not claim that plaintiff had breached its factoring agreement with the corporate debtor. Moreover, defendant had not objected to the credit extended to the corporation during the eight-month existence of the factoring agreement. Rusch Factors v. Sheffler, App. Div. 1st Dep't, 396 N.Y.S.2d 374, 95 B.L.J. 183.

Texas (1977) Where bank executed an unconditional agreement to honor monthly drafts drawn by plaintiff on a corporate depositor's account, it could not dishonor the drafts because the depositor did not have sufficient funds to cover them. Baytown State Bank v. Don McMillian Leasing Co., Tex. Civ. App., 551 S.W.2d 771, 95 B.L.J. 184.

§617. Continuing guaranties.

Louisiana (1977) Defendants, who guaranteed purchases made by a corporation which they owned and operated, were liable on guaranty even after they had sold their interest in the corporation to an employee. Defendants entered into an agreement with plaintiff, in which they guaranteed purchases made by the corporation. This guaranty was required by plaintiff as a prerequisite for the granting of credit. Under its terms, the guaranty was to continue in effect until plaintiff received written notice of revocation delivered by registered or certified mail. In July 1972, defendants sold their corporate stock and informed plaintiff's representative with whom they dealt that they were selling the business. Thereafter, they orally informed the representative that they would not be responsible for the corporation's debts. In July 1974, plaintiff delivered supplies to the corporation for which it was not paid. It brought this action against the corporation and defendants to recover the amount due for the supplies. The court held that defendants could not assert the defense of equitable estoppel. Defendants had not changed their position in justified reliance on any act, representation, or silence on plaintiff's part. The statements to plaintiff's representative were made after defendants sold their stock. Thus, defendants were still liable because written revocation of the guaranty was never given to plaintiff. La. Civ. Code, Art. 3037 (Slovenko 1961). Cudahy Foods Co. v. Rich Plan of Baton Rouge, La. App., 349 So. 2d 894, 95 B.L.J. 470.

Utah (1977) Where defendants, guarantors of a note, notified the bank that they were revoking their guaranty and the notice was received after the loan was made, but before the last renewal note was signed,

the guarantors were liable to the holder of the note. Marking Systems, Inc. v. Interwest Film Corp., 567 P.2d 176, 95 B.L.J. 373.

§620. Release of guarantor.

U.S. Court of Appeals, 5th Cir. (1977) Motion for summary judgment by the holder of a note was granted against co-guarantors of the note where holder had neither released other parties to the transaction nor impaired the collateral for the loan. The debt here was secured by a second mortgage on real property. Defendants argued that the value of this collateral was impaired when a mechanic's lien was filed against the property without their knowledge. However, the lien was actually filed before defendants signed the note. Since the lien was filed and had attached prior to execution of the note, the holder had nothing to do with it and any impairment of collateral was not attributable to him.

As a second defense, defendants contended that since the signature of one of the other guarantors was allegedly forged, they were discharged. The court held that a holder's failure to ensure the genuineness of signatures on loan documents does not constitute a release or agreement by the holder not to sue a person whose signature is forged.

As a final defense, the defendant's wife claimed that she could not bind that portion of her separate estate composed of tangible personal property by any contract of suretyship or by an assumption of the debts of her husband under Georgia law. It was held that the Georgia statute did not apply because the note was delivered in, and to be performed in, Virginia, and that state's laws governed. Virginia law imposes no disability on married women. Residential Indus. Loan Co. v. Brown, 559 F.2d 438, 95 B.L.J. 276.

Colorado (1977) An accord and satisfaction entered into by plaintiff-creditor and defendant-corporate debtor had the effect of reducing the liability of defendant-guarantors to the amount agreed upon in the accord and satisfaction. Continental Nat'l Bank v. Dolan, Colo. App., 564 P.2d 955, 95 B.L.J. 366.

Georgia (1977) Where defendant-guarantors consented in the terms of the guaranty agreement that the creditor could surrender or release the reserve account held as security for payment of the debts guaranteed, defendants could not contend that they were discharged by the creditor's act in applying the reserve account to the obligations guaranteed. Vaughn v. National Bank & Trust Co. of Columbus, Ga. App., 234 S.E.2d 718, 95 B.L.J. 184.

HOLDERS IN DUE COURSE

§630. Holder must take without notice of defect.

Arizona (1977) Plaintiff was not a holder in due course of a promissory note where he purchased it for less than full value within the forty-eight-hour rescission period mandated by the Interstate Land Sales Act. Stewart v. Thornton, 568 P.2d 414, 95 B.L.J. 563.

Louisiana (1977) Plaintiff-insurer issued a check to defendant-insured for damage to his car. When defendant had not received the check five days later, plaintiff issued a stop-payment order and drew another check payable to defendant and his attorney. After plaintiff informed defendant that another check would be issued, defendant received the first check. Defendant indorsed the first check to AAA Body and Fender Work in payment for repair work. AAA presented the check for payment, but it was not honored due to the stop payment. AAA informed plaintiff-insurer of the dishonor, and the latter is-

sued a third check payable to AAA. It then requested defendant's attorney to return the second check. The attorney refused, claiming that the repair work was faulty and that plaintiff should not have paid AAA. The court held that the insurer was entitled to recover the amount of one of the checks. The first check issued by plaintiff was a valid negotiable instrument. At the time defendant negotiated this check, AAA was unaware of the stop-payment order, and became a holder in due course. As such AAA had a right to enforce payment against either defendant as indorser or plaintiff as drawer. La. Rev. Stat. §§ 7:30, 7:50, 7:57. Any dispute between defendant and AAA as to the quality of the repairs had no bearing on plaintiff's duty to AAA as holder in due course of the check. Aetna Cas. & Sur. Co. v. Melancon, La. App., 348 So. 2d 717, 95 B.L.J. 468.

Ohio (1976) Plaintiff-bank made a loan to defendant for the purchase of a car. The loan proceeds were to be disbursed directly to the car dealership. Defendant, on receiving the car, found it to be defective and notified the bank of the defects and of his desire to cancel the note. Defendant also demanded that plaintiff-bank not disburse the loan proceeds, but plaintiff did so anyway. Defendant then sued the car dealership for breach of warranties and for fraudulent representations involved in the sale, and asked for a stay of plaintiff's action on the note. The trial court granted summary judgment in favor of plaintiff on the note. The appellate court reversed that decision, finding that the evidence presented by defendant in his affidavit did present reasonable inferences that defendant had a valid defense to the claim on the note. Defendant raised the issues that plaintiff was aware of the claim of failure of consideration because of the defects in the car and had been told not to disburse the funds. These were issues of fact that should have been determined by the trial court. Huntington Nat'l Bank v. Watters, Ohio App., 362 N.E.2d 1233, 95 B.L.J. 1850.

§631. Where holder is not charged with notice.

U.S. Court of Appeals, 8th Cir. (1977) Court found that bank was a holder in due course of a check representing an accounts receivable on secured property even though the bank had notice of filing of financial statements through a reporting service. McCook City Nat'l Bank v. Compton, 558 F.2d 871, 95 B.L.J. 455.

New York (1977) Bank, which cashed checks that had been signed by drawer in blank and that were then stolen and completed by defendant, was a holder in due course and was entitled to recover when checks were dishonored for insufficient funds. Defendant cashed the checks at plaintiff-bank where he was a customer. The court granted summary judgment to plaintiff, rejecting the drawer's allegation that a bank employee acted in concert with defendant. That allegation was not supported by evidentiary facts or materials or by an affidavit of a person claiming knowledge of such a scheme. The drawer also claimed that a factual issue existed as to plaintiff's lack of notice of a possible defense in that the first check may or may not have been returned to the bank before the second check was cashed. Knowledge by a purchaser of an instrument that there has been a default in the payment of any other instrument, except one of the same series, does not of itself give the purchaser notice of a defense or claim. Nor does knowledge that an incomplete instrument has been completed create notice of a defense or claim unless the purchaser has notice of any improper completion. U.C.C. § 3-304(4). Central State Bank v. Kilroy, App. Div. 2d Dep't, 395 N.Y.S.2d 78, 95 B.L.J. 185.

§644. Holder must take for value.

Florida (1977) Plaintiff as holder of a note was entitled to recover the balance due from defendant who refused to make further payments on the note. The parties signed an agreement by which plaintiff agreed to sell and defendant agreed to buy shares of stock. Defendant was to pay $15,000 cash immediately and the balance of the purchase price of $91,000 in forty equal monthly installments. Defendant executed a promissory note payable to plaintiff in that amount and pledged the stock as security. The note and stock were delivered to a bank acting as escrow and collection agent for the parties. On debiting defendant's account each month, the bank was to relinquish a proportionate amount of stock to defendant. Almost three years later, defendant notified the bank that no further payments would be made on the note. Plaintiff elected to sue on the note and sought recovery of the balance, $9,500. The trial court found that plaintiff failed to establish his claim by the greater weight of the evidence. Defendant had contended that there was a failure of consideration for the promissory note by virtue of nondelivery of the stock. The appellate court reversed, holding that there were more than sufficient acts and promises made by plaintiff at the time the note was executed to constitute consideration. The only evidence of failure of consideration was the unilateral action of defendant in refusing to make any further payments on the note. Thus, defendant was liable for the balance due. Wallace v. Ralph Pillow Motors, Inc., Fla. App., 344 So. 2d 949, 95 B.L.J. 471.

§650. Rights of holder in due course.

Vermont (1977) Where a holder in due course purchased property securing the note before she had purchased the note, the holder was entitled to recover full face amount of the note even though she had made a profit on the sale of the real property. Ryan v. Stearns, 376 A.2d 728, 95 B.L.J. 559.

§653. Fraud not a defense.

Georgia (1977) The drawer of a note executed a check in connection with a home-improvement contract and attempted to stop payment after learning that the payee's representations were fraudulent. Plaintiff-bank, however, had already made payment and was found to be a holder in due course. Drawer's defense of fraudulent misrepresentation was a personal defense and could not be asserted against a holder in due course. Judgment for plaintiff. Citizens Nat'l Bank of Quitman v. Brazil, Ga. App., 233 S.E.2d 482, 95 B.L.J. 86.

§656. Violation of statutes.

Louisiana (1978) Where notice of assignment sent by plaintiff, transferee of a promissory note, failed to comply with statutory requirements, plaintiff was not a holder in due course. Instead of warning defendant that any claims of defenses would be lost, plaintiff's notice was only that some claims or defenses would be lost. Seaboard Corp. v. Burdine, 354 So. 2d 737, 95 B.L.J. 851.

§660. Burden of proof.

Texas (1977) Although a purported affidavit in support of plaintiff's motion for summary judgment stated that the original promissory note was attached, the certificate by the notary was in the form of an acknowledgment rather than a jurat reciting that the affiant swore to the truth of the statements appearing above his signature. The record did not otherwise show that the original note was produced. The court found that the proof failed to establish that plaintiff was the owner and holder of the promissory note. An original document may not be considered in support of a motion for summary judgment

without competent summary judgment evidence identifying it. Sherer v. Bench, Tex. Civ. App., 549 S.W.2d 57, 95 B.L.J. 281.

INCOMPLETE INSTRUMENTS

§662. Implied authority to fill in blank spaces.

Texas (1977) Where there was no evidence that defendants, comakers of a note, withheld from plaintiff-payee authorization to complete the promissory note, plaintiff was deemed to have implied authority to do so. The completion of the blanks in an instrument is not necessarily an alteration of it. The important issue is whether the person completing the instrument had the authority to do so. Testimony by the comakers that they did not expressly give plaintiff the authority to fill in the blanks did not overcome the presumption that plaintiff had the authority to complete the blanks with respect to the date and prematurity interest. Antrim v. McMurrey, Tex. Civ. App., 549 S.W.2d 463, 95 B.L.J. 186.

INDORSEMENTS

§683. Guarantor.

New York (1977) Judgment was awarded to plaintiff-payor bank against defendant-collecting bank, which had guaranteed all prior indorsements on checks on which the payees' indorsements were missing. Plaintiff alleged that defendant breached warranties of good title in that it guaranteed the prior indorsements on the checks before transferring them to plaintiff. The court found that the checks were order instruments and that as such they could only be negotiated by indorsement and delivery. The court rejected defendant's argument that it had supplied the missing indorsement by indicating on the checks that the items were credited to the customer's account since the fictitious payees were not customers of the collecting bank. Bank Leumi Trust Co. v. Marine Midland Bank, N.Y. County, 394 N.Y.S.2d 535, 95 B.L.J. 187.

INTEREST

§740. Construction and validity of interest clause.

Georgia (1977) A loan contract which provided that "a default in the making of any payment or part thereof shall render at the option of the Creditor, the entire unpaid balance due and payable" was in contravention of the Industrial Loan Act and was void and unenforceable. Ga. Code Ann. § 25-301. The provision was found to be an acceleration clause that provided for acceleration of unearned interest. Blazer Financial Serv., Inc. v. Dukes, Ga. App., 234 S.E.2d 149, 95 B.L.J. 87.

Ohio (1976) Held that banks in Ohio have the right to charge "add on" interest on installment loans not in excess of 8 percent and to receive interest as assignees of such installment contracts entered into by automobile dealers, even though the effective rate of interest exceeds 8 percent. Lucas v. Central Trust Co., Ohio App., 361 N.E.2d 1080, 95 B.L.J. 86.

JUDGMENTS

§762. Judgments.

Georgia (1977 Defendant was not entitled to dismissal of complaint for failure to state a claim where the allegations were not insufficient to disclose with certainty that plaintiff would be entitled to relief under any state of facts that could be shown in support of the claim. The trial court erred also in dismissing defendant's answer where the answer raised an issue for jury determination. Plaintiff was not

entitled to judgment unless it proved by competent evidence that the defendant was indebted to it in the amount claimed. Since no such proof was offered, it was error to grant judgment for plaintiff. Paris v. Citizens & So. Nat'l Bank, Ga. App., 233 S.E.2d 433, 95 B.L.J. 88.

New York (1977) The granting of defendant's motion to vacate a default judgment against it did not preclude the court from subsequently granting plaintiff's motion for summary judgment. Defendant claimed that implicit in the court's granting of his motion to vacate was the finding of a meritorious defense to the action and that this precluded the subsequent grant of summary judgment. However, the court disagreed, stating that here the default judgment was entered before the expiration of the thirty-day statutory period in which defendant could appear and answer. Red Creek Nat'l Bank v. Blue Star Ranch, App. Div. 4th Dep't, 396 N.Y.S.2d 936, 95 B.L.J. 282.

Texas (1977) Plaintiff's motion for summary judgment based on a promissory note payable to him and executed by defendant-corporation was granted where defendant answered the suit with only a general denial. Tamsco, Inc. v. Janus, 553 S.W.2d 244, 95 B.L.J. 465.

JURISDICTION

§763.5. Jurisdiction—venue.

Washington (1977) In a suit against a national bank and its bank holding company, the bank was determined to be a necessary party to the action and plaintiff was permitted to choose a forum other than the bank's home county. Plaintiff instituted the action against the bank and the holding company but voluntarily dismissed the bank on the same day. The complaint alleged that defendant had infringed on plaintiff's service mark "MoneyMax" by utilizing its service mark "Blue Max." Plaintiff sought a permanent injunction enjoining the bank from using the words "Blue Max" and "Max." The bank holding company, which owned 100 percent of the shares of the bank, maintained its home office in King County. It moved to dismiss the action or for a change of venue to King County. As a national banking association, it had the right to be sued only in the district in which its home office was located. 12 U.S.C. § 94. However, this right may be waived or lost depending on the acts of the national bank. The trial court ordered a change of venue to King County on the belief that the bank could only be joined in the county of its main office. The appellate court disagreed. The bank could be joined in Spokane County, but it has the right to challenge venue and seek a transfer to King County. Plaintiff had the right to choose its forum, and the trial court's order of change of venue was premature. Until the bank actually seeks a change of venue, that issue is not properly before the court. Old Nat'l Bank of Wash. v. Rainier Bancorp., Wash. App., 567 P.2d 695, 95 B.L.J. 562.

LETTERS OF CREDIT

§766. Letters of credit.

Illinois (1977) Liquidator of New York Insurance Co. was permitted to intervene in a suit where a plaintiff-insurance agent sued defendant-bank to enjoin it from paying out funds on an irrevocable letter of credit. To intervene, a liquidator must show that his interest will not be adequately represented by the existing parties. Pastor v. National Republic Bank of Chicago, 371 N.E.2d 1127, 95 B.L.J. 852.

New York (1977) Chemical Bank could not be enjoined from honoring and making payments under certain letters of credit where the documents presented were in

good form, even though one of the parties to the underlying agreement had filed a petition in bankruptcy prior to the payments against the letters of credit. Foreign Venture Ltd., Partnership v. Chemical Bank, N.Y.L.J. (Nov. 15, 1977), 95 B.L.J. 363.

VOLUME II

GENERAL LIENS

§821.3. Effect of filing.

Illinois (1977) Plaintiffs mailed notices of mechanic's liens and filed claims for liens in the office of the Recorder of Deeds. The court held that plaintiffs had exercised due diligence in attempting to locate defendants. The statutory notice requirement is the very substance on which a mechanic's lien may be enforced. Ill. Rev. Stat., Ch. 82, ¶ 24. Plaintiffs were entitled to enforce the liens against defendants. Lundy v. Boyle Indus., Inc., Ill. App., 361 N.E.2d 321, 95 B.L.J. 88.

§821.5. Tax liens.

U.S. District Court, E.D. Pa. (1977) Bank acted properly in surrendering bank accounts of plaintiffs to government pursuant to an IRS levy even though plaintiffs claimed they did not owe any taxes and were not nominees of anyone who did. The court rejected plaintiffs' contention that the bank should have required the government to bring an action against it to prove that plaintiffs were really nominees of the taxpayer before the bank surrendered the assets. However, levies against property in the hands of a "straw party" or nominee are valid. Plaintiffs had the right to sue the United States directly to recover for wrongful levy and in that proceeding contest their designation as nominees. DiEdoardo v. First Nat'l Bank of Bath, 442 F. Supp. 499, 95 B.L.J. 853.

LOAN AND DISCOUNT

§822. Liabilities of parties.

New York (1977) The court held that the record clearly entitled defendant-bank to judgment on note executed by plaintiff and that any oral agreement or impression by plaintiff to the contrary was inadmissible to vary the terms of the note, which was clear and unambiguous on its face. Plaintiff failed to introduce evidence as to what defendant-bank or its officers did or said to give her the impression that she would not be responsible on the note. Upon presentment of sufficient collateral, clear on its face, by plaintiff, defendant was not negligent in failing to make additional inquiry. Pomerance v. Nanuet Nat'l Bank, App. Div. 2d Dep't, 394 N.Y.S.2d 444, 95 B.L.J. 187.

§827. Loans by nonbanking corporations.

Georgia (1977) Court construed two parts of the same note *in pari materia* to find that plaintiff did not contract, charge, or institute suit for unearned interest. Plaintiff-loan corporation permitted defendant to execute a new note to pay off a preexisting one. Defendant failed to make payment, and this action was commenced. Defendant alleged there was a violation of the Industrial Loan Act in that the note permitted acceleration of unearned interest. Part III of the note contained an acceleration clause which stated that in case of default, the holder may declare an acceleration of the maturity of the note rendering the entire indebtedness immediately due and payable. Part III was preceded by the statement that the terms set forth in Part I, Section (o) are made part of this note. That section stated that on acceleration of the maturity of this note for default, the lender will rebate interest in proportion to the reduction in the loan term. Read together, the parts of the note in question do not violate the Industrial Loan Act. Wiggins v. Lib-

erty Loan Corp., Ga. App., 237 S.E.2d 418, 95 B.L.J. 563.

MAKER

§831. Liability of maker.

Florida (1977) Where defendant signed a promissory note with the word "by" preceding his name, he did not sign in a representative capacity, and he was personally liable on the note. An authorized representative who signs his own name to an instrument is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity. U.C.C. § 3-403(2)(a). Extrinsic evidence is admissible to show that the maker of a negotiable instrument signed in a representative capacity and is not therefore personally obligated on the note if the instrument names the person represented but does not show that the representative signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity. U.C.C. § 3-403(2)(b). Extrinsic evidence was not admissible here because the note neither named the person represented nor showed that the defendant signed in a representative capacity. Giacalone v. Bernstein, Fla. App., 348 So. 2d 679, 95 B.L.J. 468.

Georgia (1977) A draft was payable on acceptance to the order of plaintiff, drawn by the defendant-insurer on the drawee bank. Defendant contended that the draft was conditional on acceptance and, since it was not accepted when presented for payment, defendant incurred no liability. The court disagreed, holding that a draft is dishonored when acceptance is refused by the drawee, which event gives the holder an immediate right to recourse against the drawer. U.C.C. § 3-507(1)(a)(2). The drawer engages that upon dishonor of the draft and any necessary notice of dishonor or protest he will pay the amount of the draft to the holder. U.C.C. § 3-413(2). Baum v. Cotton States Mutual Ins. Co., Ga. App., 234 S.E.2d 178, 95 B.L.J. 88.

New York (1977) The court held that the record clearly entitled defendant-bank to judgment on a note executed by plaintiff and that any oral agreement or impression by plaintiff to the contrary was inadmissible to vary the terms of the note, which was clear and unambiguous on its face. Plaintiff failed to introduce evidence as to what defendant-bank or its officers did or said to give her the impression that she would not be responsible on the note. Upon presentment of sufficient collateral, clear on its face, by plaintiff, defendant was not negligent in failing to make additional inquiry. Pomerance v. Nanuet Nat'l Bank, App. Div. 2d Dep't, 394 N.Y.S.2d 444, 95 B.L.J. 187.

New York (1977) Change of place of payment of a promissory note by the holder was not a material alteration and did not discharge the maker of the note from liability thereunder. Central State Bank v. Powar & Ferraioli Enterprises, Ltd., Sup. Ct. N.Y. County, 395 N.Y.S.2d 328, 95 B.L.J. 464.

Oklahoma (1977) Plaintiff was not obligated to sue defendant as a corporate entity where it had dealt with defendant as an individual and was unaware of defendant's subsequent incorporation. Defendant's failure to disclose that he was acting in his capacity as president of a corporation rendered him personally liable for credit extended by plaintiff. A check offered into evidence by plaintiff strongly suggested that the maker was a sole proprietor doing business as H&R Disposal Service. The words "H&R Disposal Service" implied no more than an account designation and did not end with any

word statutorily connoting incorporation as required by law. 18 Okla. Stat. § 1.11(a) (1971). To avoid personal liability, the signer of an instrument must set out the name of the principal before or after the name and office of an authorized individual. Custom Equip. Co. v. Young, Okla. App., 564 P.2d 1020, 95 B.L.J. 459.

§832. Joint makers.

Georgia (1977) Where a security agreement executed by defendant contained a provision authorizing the release of collateral by plaintiff without defendant's consent or notice to him and without affecting his liability, defendant had consented and thereby waived his right to claim a discharge for impairment of the collateral. The instrument had a clause in which the maker agreed that the note could be renewed or extended and that the security or any party could be released or substituted without notice and without affecting his liability. The court held that there was doubt whether the insurance obtained by plaintiff could even be considered collateral in view of the language of the note. Even if it were treated as collateral, defendant gave his consent in advance in the instrument to the release or substitution of the collateral and thereby waived his right to claim discharge. The consent required no consideration. McBurnett v. National City Bank of Rome, Ga. App., 236 S.E.2d 179, 95 B.L.J. 462.

MONEY ORDERS

§858. Negotiability of money orders.

Nebraska (1977) Bank could not refuse to honor its money order where it had received consideration for the issuance thereof. The money order was purchased by S&H Poultry, Inc. and delivered to plaintiff in payment for a load of poultry products. The same day, S&H went out of business and returned the poultry to plaintiff. Defendant then refused to honor the money order, and this action was commenced. No evidence was presented that plaintiff agreed to apply money orders only to future purchases, that defendant had an interest in the poultry purchased by S&H, or that the proceeds from the sale would be used only to pay the indebtedness of S&H to defendant. Thus, the bank was bound to honor the money order when presented. A bank money order is essentially the same as a cashier's check and is not subject to countermand by either its purchaser or the issuing bank. Purchased for adequate consideration, a bank money order stands on its own foundation as an independent, unconditional, and primary obligation of the bank. U.C.C. §§ 3-410, 4-303. Thompson Poultry, Inc. v. First Nat'l Bank of York, 255 N.W.2d 856, 95 B.L.J. 472.

MORTGAGES

§862. Chattel mortgages generally.

Louisiana (1977) The court dismissed bank's suit on a promissory note where defendant denied signing the note and plaintiff presented no proof that defendant did sign it. Colonial Bank v. Peters, 353 So. 2d 400, 95 B.L.J. 854.

§927. Action against national bank.

U.S. Supreme Court (1977) Plaintiff-Bougas filed a complaint against defendant-national bank in the state court in De Kalb County, Ga., alleging that the bank's branch in that county had wrongfully converted a savings certificate. The bank moved to dismiss the suit, contending that federal law provides that venue in state court actions against a national bank is proper only in the county in which the bank is "located," 12 U.S.C. § 94, and that it is "located" for purposes of the statute only in Chatham County, its charter county. The Court ruled that a national bank is "located" in any county in which

it operates an authorized branch, and can be sued in any such county. The Court noted that this interpretation of the statute "will not inconvenience the bank or unfairly burden it with distant litigation in violation of any congressional policy." Citizens & So. Nat'l Bank v. Bougas, 98 S. Ct. 88, 95 B.L.J. 271.

Texas (1977) Plaintiff sued the Houston National Bank for damages to lands and to prevent or stay waste on lands. Texas law provides that such suits must be brought in the county in which the land lies. Tex. Stat. Ann. Art. 1995(14). The National Bank Act provides for exclusive venue in suits against national banks in the county in which the bank is located. 12 U.S.C. § 94. However, the court found there were two exceptions to the exclusive venue provision: (1) When a bank consents to be sued in a county other than the county of its location or otherwise waives its right to be sued there; and (2) cases involving local in rem actions as opposed to transitory actions. The court held that the instant action was local in nature and fell within the second exception. Houston Nat'l Bank v. Farris, Tex. Civ. App., 549 S.W.2d 420, 95 B.L.J. 89.

§928. Action in foreign state.

Florida (1977) Defendant-fish seller agreed to purchase a quantity of fish from plaintiff and to make part payment from defendant-Michigan National Bank of Detroit through an irrevocable letter of credit payable to plaintiff as beneficiary. Plaintiff delivered the fish but claimed that defendant never paid for it and that payment was refused when the letter of credit was presented upon defendant-Michigan National Bank. Plaintiff filed suit in Florida against defendant-fish seller for the purchase price of the fish and against defendant-bank for the amount of the letter of credit on the ground of breach of the letter. Federal law states that a national banking association must be sued in the district or county where it is established. 12 U.S.C. § 94. The court held that the statute is mandatory unless expressly waived, and that commission of a tort or entering into a contractual arrangement in a foreign district is insufficient basis for inferring waiver of the venue privilege. The record failed to demonstrate waiver by the bank. Michigan Nat'l Bank of Detroit v. Melru Int'l, Ltd., Fla. App., 351 So. 2d 1139, 95 B.L.J. 663.

NEGOTIABILITY

§947. Instrument must be unconditional.

Louisiana (1978) Plaintiff-bank was entitled to recover funds paid by it in exchange for defendant's warrant even though a stop payment was put on the warrant before it was presented for payment. The fact that the warrant was limited to payment out of a particular fund did not prevent it from being negotiable. Nor was the fact that the warrant was a collection item important. St. James Bank & Trust Co. v. Board of Comm'rs, 340 So. 2d 233, 95 B.L.J. 854.

NOTICE OF DISHONOR

§1004.5. Notice of dishonor generally.

New York (1977) On August 18, 1975, defendant deposited a check in her account with plaintiff bank. The check was drawn on First National City Bank and was payable to defendant. The next day, the check was received by First National and was promptly returned to the Central Note Teller Department of plaintiff bank with the notation "refer to maker." On August 22, defendant was issued a check against her account at plaintiff bank for the amount of the check deposited and she received cash for it. Plaintiff first received notice from its Central Note Teller Department on August 25 that the check

had been returned and it then notified defendant of same. The court held that a bank's remedy of chargeback is conditioned on the requirement that the bank, by its midnight deadline or within a longer reasonable time after it learns of the facts, returns the item or sends notification of the facts. U.C.C. § 4-212(1). Plaintiff claimed that the Central Note Teller Department was a separate bank for the purpose of determining time limits. U.C.C. § 4-106. The court rejected the argument, ruling that ordinary care requires the communication of a notice or order to the proper branch of a bank, and such order or notice would be effective at such proper branch from the time it was or should have been received. Manufacturers Hanover Trust Co. v. Akpan, Civ. Ct. Kings County, 398 N.Y.S.2d 477, 95 B.L.J. 558.

OVERDRAFTS

§1147. Rights of bank against depositor where account overdrawn.

Georgia (1977) Bank sued husband and wife depositors, alleging that they had overdrawn their joint savings account by $3,000 and refused to repay it. Defendants had contended that they made a $4,000 deposit, which the bank erroneously treated as a $1,000 deposit. The court properly admitted into evidence as a business record a deposit slip presented by the bank showing a $1,000 deposit. Ga. Code Ann. § 38-711 (1952). The dispute over its accuracy affected only the weight to be given it by the jury and not its admissibility. Defendant-wife further contended that if the overdraft did exist, it was created solely by a withdrawal made by her husband so that she could not be held liable. The account was clearly a joint one, however, and the cashier's check which plaintiff-bank gave defendant-husband for the amount of the withdrawal creating the overdraft was indorsed by defendant-wife and deposited by her in accounts in other banks. The jury returned a verdict in favor of the bank, and the appellate court upheld the verdict. Defendant-wife's liability for the overdraft was clearly established. Brooks v. National City Bank of Rome, Ga. App., 236 S.E.2d 132, 95 B.L.J. 463.

PAYMENT

§1214. Part payment of note.

Nevada (1977) Plaintiff and his wife, subsequently deceased, borrowed $15,000 from a bank and then loaned this amount to defendants, their son and daughter-in-law, who executed a non-interest-bearing note for $15,000 to plaintiff and his wife. Defendants claimed that plaintiff's wife forgave the note before she died and that defendant did the same in exchange for a quitclaim deed from defendants to certain real property. The court held that payments received from defendants by plaintiff after his wife's death and after plaintiff obtained the quitclaim deed were considered by plaintiff to be payments on the note. Plaintiff and his deceased wife had not forgiven the loan; judgment in plaintiff's favor for the balance of the note plus attorney's fees upheld. Tamagni v. Tamagni, 562 P.2d 481, 95 B.L.J. 89.

§1223. Payment of checks.

Florida (1977) A corporation not a party to this action delivered a check to plaintiff-bank on June 19, 1974. The check was payable to plaintiff and drawn on the corporation's account at defendant-bank. On June 21, 1974, an official of defendant-bank called plaintiff to advise it that the check was being dishonored. The check was stamped "drawn against uncollected funds" and returned to plaintiff-bank. The court ruled that defendant never made final payment on the check and was not obligated to honor it. An item is finally paid when the payor-bank has completed

the process of posting the item to the indicated account of the person to be charged therewith. U.C.C. § 4-213(1)(c). Barnett Bank of Tallahassee v. Capital City First Nat'l Bank, Fla. App., 348 So. 2d 643, 95 B.L.J. 467.

PLEDGE AND COLLATERAL

§1269. Pledge and collateral in general.

Montana (1977) The parties had entered a stock purchase agreement wherein plaintiff acquired 100 shares of stock in defendant-corporation. The agreement provided that if plaintiff wished to sell any or all of his stock, the defendant must purchase it. When plaintiff requested that the corporation repurchase his stock, a promissory note was executed, representing full consideration for the purchase of plaintiff's stock. In this action on the note, a corporate officer who had known of the promissory note's existence for two-and-a-half years prior to the trial of the action was estopped from intervening as a defendant. By his failure to act, the officer had waived his right to contest the validity of the note. A default judgment was entered against the corporate defendant. The repurchase of the stock by means of a promissory note was found not a violation of a statute requiring that such purchases be made from surplus funds. Archer v. LaMarch Creek Ranch, 571 P.2d 379, 95 B.L.J. 561.

§1271. Validity of pledge.

Kentucky (1977) Husband and wife executed a ninety-day note and pledged as collateral Xerox stock in the individual name of the wife and telephone stock registered in their joint names. After the ninety days, part payment was made and the husband individually executed a renewal note. Thereafter, the husband died and the wife brought suit for the return of her stock and discharge from further liability on any indebtedness. The court held that the stock still secured the debt and the bank need not return it to the wife until the debt was paid. Where a note is given merely in renewal for another note and not in payment, the renewal does not extinguish the original debt or in any way change the debt except for postponing the time of payment, even though the first note was surrendered. Georgi v. First Nat'l Bank of Louisville, Ky. App., 557 S.W.2d 442, 95 B.L.J. 662.

Mississippi (1977) Where plaintiff executed a renewal note with full knowledge of the facts constituting a defense to the original note, she waived that defense as to the renewal. Citizens Nat'l Bank v. Waltman, 344 So. 2d 725, 95 B.L.J. 282.

SAVINGS BANKS

§1359. Powers of savings banks.

U.S. Court of Appeals, 10th Cir. (1977) Plaintiffs were depositors in a federally chartered mutual savings and loan association which created a plan to convert into a stock association retaining its federal charter. The plaintiffs would receive "free stock" in the new entity. The conversion was permitted under the Home Owners' Loan Act of 1933. Plaintiffs claimed that Rule 10b-5 of the Securities and Exchange Commission was violated and that regulations of the Federal Home Loan Bank Board were disregarded. The action was dismissed because the exclusive remedy permitted by statute was a review of the determination by the Home Loan Bank Board. 12 U.S.C. §§ 1725(j)(4), 1730a(k). Harr v. Prudential Fed. Sav. & Loan Ass'n, 557 F.2d 751, 95 B.L.J. 280.

Pennsylvania (1977) The state attorney general had responded to an inquiry from the Secretary of Banking that nothing in the Banking Code prohibits savings banks operating under the Code from offering

depositors non-interest-bearing accounts from which money may be withdrawn by means of a negotiable order of withdrawal (NOW) payable to a named third party. Petitioners in this action claimed that because the Code authorizes only savings accounts for mutual savings banks, the regulations may not permit savings accounts to be converted into checking accounts. The court agreed with the attorney general's opinion, including the proviso thereto that each NOW account contain language which indicates that the bank may require fourteen days' notice before making payment. The Code does not provide for any method of withdrawal from savings accounts aside from the fourteen-day notice provision. Banking Code § 503(a). Pennsylvania Bankers Ass'n v. Commonwealth of Pa., 379 A.2d 1062, 95 B.L.J. 566.

§1365. Production of passbook.

United States Court of Appeals, 7th Cir. (1978) As between two banks claiming funds in savings accounts, the loss had to be borne by the savings association which issued the passbooks to its depositor without indicating on the face of the books that there was any claim or encumbrance on the account. Liberty Sav. Ass'n v. Sun Bank of Jacksonville, 572 F.2d 591, 95 B.L.J. 843.

Texas (1977) Plaintiff initiated this action to recover the proceeds of a passbook savings account which she had opened over forty years earlier with an initial deposit of $1,000. Plaintiff never made any additional deposits, did not make any withdrawals, and was never contacted by defendant-bank concerning the account. Defendant introduced records of an account of one Mrs. C.F. Booker, which it claimed was that of Mrs. C.F. Booher, the plaintiff. The account had been closed after a series of small withdrawals. The bank did not have any record of a power of attorney from plaintiff nor did it have an affidavit of lost passbook from her or an authorization to give money in the account to anyone else. Plaintiff presented a passbook which had been in her continuous possession for over forty years. The court found for plaintiff, holding that the records of withdrawals and deposits presented by defendant were not the records of plaintiff's savings account. Defendant argued that a presumption of payment by the bank arises after a lapse of time that is by common consent usually placed at twenty years. The court held that it is a rebuttable presumption. Central Nat'l Bank of McKinney v. Booher, Tex. Civ. App., 557 S.W.2d 563, 95 B.L.J. 658.

STATUTE OF LIMITATIONS

§1386. Action on note.

Louisiana (1977) In January 1967, testatrix issued a check to defendants and on the face of the check made the notation "loan." On the same day, defendants signed an instrument acknowledging receipt of the loan. It stated that the terms of the loan would be established at a later date to the satisfaction of the lender. The suit was brought by testatrix's heirs and legatees, who claimed that the ten-year statute of limitations applied. Defendants claimed that the action was one for money lent within the three-year statute. The court concluded that those actions wherein a prescriptive period is relatively short contemplate oral transactions which cover the general spectrum of everyday encounters between creditors and debtors. When an oral obligation is incurred and the obligation is acknowledged in writing, the character of the action is changed, and it becomes a personal action. The statute of limitations is transposed from that of three years to that of ten years. The written instrument here had such an effect. Defendants also

argued that the writing in question was a note subject to a five-year statute of limitations. The court disagreed, stating that for an instrument to be a note, it must be payable on demand or at a fixed time. Since the terms of this writing were left to the future, it was not a note. Jones v. Butler, La. App., 346 So. 2d 790, 95 B.L.J. 477.

SURETIES

§1484. Rights and liabilities of sureties in general.

U.S. District Court, E.D. Pennsylvania (1977) An action was brought by a creditor against a surety. Debtor was not joined in the suit. The court held that the debtor was not an indispensable party. The liability of the surety and principal is direct and not collateral. All that is necessary to obtain judgment against a surety is a showing of breach by the principal of the condition of the bond and it is immaterial whether the principal is before the court. The court also denied defendant's motion to stay the proceedings until an action in Florida that it had commenced against the debtor was concluded. An action by a creditor against a surety is a separate matter from an action by the surety against a principal. Finance-America Credit Corp. v. Kruse Classic Auction Co., 428 F. Supp. 135, 95 B.L.J. 90.

TRUST RECEIPTS

§1562. Trust receipts.

U.S. Court of Appeals, 5th Cir. (1977) Plaintiff-debtor alleged that the fact that a disclosure statement was dated in the upper right-hand corner but not separately dated in the blocked-off area of the form entitled "Insurance Statement" constituted a violation of the Truth in Lending Act, and he demanded twice the amount financed. 15 U.S.C. § 1640(a). The regulations state that a customer desiring insurance must give "specific dated and separately signed affirmative written indication of such desire." 12 C.F.R. § 226.4(a)(5)(ii). The court held that there was no suggestion in the regulation that a date on the same piece of paper as the affirmative written indication but outside the box labeled "Insurance Statement" was inadequate. The court refused to read such a requirement into the regulation because it would permit plaintiff borrower to receive a windfall not intended by the statute. Hayslip v. Dunlap Chevrolet Co., 560 F.2d 129, 95 B.L.J. 557.

TRUTH IN LENDING

§1562.01. Truth in Lending.

U.S. Court of Appeals, 3d Cir. (1977) Plaintiff-borrower alleged that defendant-bank failed to identify properly in the disclosure statement and the note and the security agreement a security interest in the proceeds and in the unearned premium of a property insurance policy covering the automobile he purchased. Reg. Z §§ 226.8(a), 226.8(b)(5). Plaintiff also claimed that the bank did not properly disclose a security interest in after-acquired property consisting of accessions to the automobile. Reg. Z § 226.8 (b)(5). Third, plaintiff asserted that the inclusion of a reference to a warrant to confess judgment in the note and security agreement, when in fact there was no such warrant, violated the Truth in Lending regulations. The court found for plaintiff on all three allegations. This was not a case where a clear identification of the type of security interest could not be properly made on the disclosure statement due to the length of such identification. Gennuso v. Commercial Bank & Trust Co., 566 F.2d 437, 95 B.L.J. 654.

U.S. Court of Appeals, 8th Cir. (1977) The parties executed an installment sales con-

tract which also served as a disclosure statement pursuant to the Truth in Lending Act. The amount financed included a $12.58 premium for credit life insurance. None of the premium was included in the finance charge, and plaintiff alleged that this violated the Act. The court rejected plaintiff's argument that part of the premium charged for the credit life insurance should have been considered interest. The Act states that charges for credit life insurance shall be included in the finance charge unless coverage of the debtor is not a factor in approval of the extension of credit and this fact is clearly disclosed. 15 U.S.C. § 1605(b). Under such an exception, as in the instant case, disclosure of the premiums is sufficient to meet the requirements of the Act. 12 C.F.R. § 226.4. Hickman v. Cliff Peck Chevrolet, Inc., 566 F.2d 44, 95 B.L.J. 663.

U.S. District Court, D. Arizona (1977) Plaintiff's claim arose from the credit sale of a pick-up truck. Defendant did not give plaintiff a copy of the security agreement on the Saturday on which he signed the agreement and took possession of the truck. Instead, it retained all copies and mailed a copy to plaintiff after the sales manager had signed it on the following Monday. Price, interest, and other figures had been explained to plaintiff, and the security agreement had been redrafted several times before its terms were satisfactory. It was undisputed that plaintiffs preferred to have the truck on Saturday even though they understood that the sale would not be final until approved by the sales manager. The Truth in Lending regulations require that disclosures be made before the transaction is consummated and that at the time disclosures are made, the creditor must provide a document identifying the creditor and making the required disclosures. 12 C.F.R. § 226.8(a). Although a technical violation existed, the court refused to impose civil liability on defendant. Defendant's plan to mail the agreement had been acceptable to plaintiff. Therefore, plaintiff was estopped from complaining that he did not receive a copy of the security agreement on Saturday. Jumbo v. Nester Motors, Inc., 428 F. Supp. 1085, 95 B.L.J. 372.

U.S. District Court, D. Vermont (1977) Any additional obligation imposed by the computation of daily interest, due by reason of late payment during the term of the loan, did not constitute an undisclosed default or delinquency charge. Lipson v. Burlington Sav. Bank, 428 F. Supp. 1073, 95 B.L.J. 276.

U.S. District Court, D. District of Columbia (1977) In a security agreement covering multiple transactions the cross-collateral clause on the reverse side of the contract did not clearly identify the collateral carried over from previous transactions. Defendant-creditor's consolidation of a prior transaction coupled with lumping of principal and interest payments, even with prior contracts in hand, left no clear way for the purchaser to ascertain which items purchased had been paid for and hence released from security and which had not. Creditor violated the Truth in Lending Act by failing to provide a clear description of the property subject to a security interest. 12 C.F.R. § 226.8(b)(5). Plaintiff was awarded double the finance charge attributable to each transaction after eliminating the carryover, as well as attorney's fees. Blackmond v. Walker-Thomas Furniture Co., 428 F. Supp. 344, 95 B.L.J. 91.

Alabama (1977) In an action arising from the sale of a mobile home by defendant to plaintiffs, plaintiffs alleged that defendant breached its warranty, committed fraud, and violated the Truth in Lending Act. The jury found in favor of plaintiffs

on the allegations of breach of warranty and fraud, and the trial court directed a verdict in plaintiffs' favor on the Truth in Lending claim. The high court held that inconsistencies in the testimony created a scintilla of evidence in defendant's favor which precluded the granting of a directed verdict. The issue of violation of the Truth in Lending Act should have been submitted to the jury. Vintage Enterprises, Inc. v. Cash, 348 So. 2d 476, 95 B.L.J. 367.

Delaware (1977) State court has subject matter jurisdiction over case alleging violations of the federal Truth in Lending Act. Any action under the Act may be brought in any U.S. district court or in any other court of competent jurisdiction, within one year of the date of the occurrence of the violation. 15 U.S.C. § 1640 (e). A state court which enforces claims under state laws that are similar to a claim established by federal law may not decline to enforce the federal law when the federal legislation does not give exclusive jurisdiction to the federal courts. Actions brought pursuant to Truth in Lending have been held to be very similar to a usury action, and actions based on the usury laws of Delaware must be brought in state court. Perry v. American Fin. Corp. of Milford, 372 A.2d 224, 95 B.L.J. 367.

Kentucky (1977) Borrower was not barred by the statute of limitations from recovering a penalty from the lender for violation of the Truth in Lending Act where lender initiated the action and borrower asserted his defense by way of counterclaim. While an affirmative action brought by the borrower to recover a penalty more than one year after violation of the disclosure requirements would be barred by the Act, there was no such provision clearly barring the assertion of such a violation and penalty as a defense in the nature of recoupment. Empire Fin. Co. of Louisville v. Ewing, 558 S.W.2d 619, 95 B.L.J. 855.

Louisiana (1977) Loan disclosure statement showed an annual interest rate of 36 percent, but plaintiff acknowledged that the actual rate was greater than 36.75 percent. The employee of the plaintiff who was in charge of defendant's loan apparently skipped down one line on the reference table when copying the figures onto the disclosure statement. The Truth in Lending Act provides that a creditor may not be held liable for violation of the Act if the creditor shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. 15 U.S.C. § 1640 (c). The court held that plaintiff maintained a procedure reasonably adapted to avoid clerical and mathematical errors, and that the error in the payment schedule was one involving honest mistake. Foundation Plan, Inc. v. Breaux, La. App., 345 So. 2d 955, 95 B.L.J. 188.

New York (1978) Failure of plaintiff-lender to state in its combined note and disclosure statement that the security interest covering defendant's after-acquired household consumer goods was limited to those goods acquired by defendant within ten days after the loans were made did not violate the disclosure requirements of the Truth in Lending Act or of the Banking Law. The ten-day limitation as to after-acquired consumer goods was imposed by state law. This portion of the state law did not have to be incorporated by the lender in the note and disclosure statement. Interlaken Fin. Corp. v. Payne, 401 N.Y.S.2d 731, 95 B.L.J. 855.

Texas (1977) Defendants executed a note for $625.00, representing a cash advance of $482.14 plus interest of $142.86. The amount of interest charged by plaintiff

represented the maximum permitted by law. Tex. Rev. Civ. Stat. Ann., Art. 5069, §§ 3.15(1), 3.15(2). As authorized by Texas law, the note provided for an additional charge of five cents for each dollar of any scheduled installment when any portion of such installment continued unpaid for ten days or more following the date payment was due. Defendants were constantly late with their payments and finally ceased sending any at all. Plaintiff sued to recover the entire unpaid balance, and defendants counterclaimed, seeking recovery of penalties for violations of the usury statute and the Truth in Lending Act. The court held that although plaintiff did not charge defendants a usurious rate of interest, it did violate the Truth in Lending Act by failing to specify in the disclosure statement the amount or the method of computing the amount of any default in the event of late payments. 12 C.F.R. §§ 226.6(a), 226.8(b)(4). The fact that the method of computing the default charge was set out in the note was not sufficient to avoid a violation of Regulation Z. Defendants were entitled to recover twice the amount of the finance charge in addition to court costs and attorney's fees. Chavez v. Aetna Fin. Co., Tex. Civ. App., 553 S.W.2d 174, 95 B.L.J. 276.

UNIFORM COMMERCIAL CODE

§1562.51. Article 1—General Provisions. **Georgia** (1977) Defendant-bank, as holder of plaintiff-corporation's note, had concluded that it was insecure and, pursuant to the terms of the note, caused the due date to be accelerated and the funds on deposit in the corporation's account to be appropriated and applied to the note. This left a balance of zero in plaintiff's account so that defendant refused to honor a corporate check presented two weeks after the setoff. Plaintiff and its president sought damages against the bank for defamation and misappropriation of funds in plaintiff's account. The bank counterclaimed for the balance due on the note and for attorney's fees. The court awarded judgment to defendant. A term providing that a party may accelerate payment "at will" or "when he deems himself insecure" empowers him to do so only if he in good faith believes that the prospect of payment is impaired. U.C.C. § 1-208. The burden of establishing lack of good faith is on the party alleging such lack. Custom Panel Sys., Inc. v. Bank of Hampton, Ga. App., 239 S.E.2d 558, 95 B.L.J. 661.

§1562.53. Article 3—Commercial Paper. **Alabama** (1977) A note given by a stockholder-investor in a corporation was supported by consideration when given to prevent foreclosure or suit on the corporation's debt. Mock v. First City Nat'l Bank, 352 So. 2d 1112, 95 B.L.J. 856.

Georgia (1977) Defendant was indebted to a third party, Young, for services rendered. Defendant paid Young partly in cash and partly in notes. Young tendered these notes to plaintiff for "immediate cash," but plaintiff refused to take them. Young then had defendant execute a promissory note for $13,000 payable to plaintiff, and plaintiff thereafter gave Young $1,500 in cash and paid $1,509 to Young's creditors. Defendant claimed that the agreed-upon consideration for his execution of the note was that plaintiff would discount the note and since plaintiff did not do so, no consideration was received. The trial court found that plaintiff gave defendant consideration to the extent of $3,009 and awarded judgment to plaintiff in that amount. The agreement to discount was not the only consideration for the note. Moreover, there was evidence that the note was given in payment of an antecedent obligation so that no consideration was necessary.

U.C.C. § 3-408. Cleveland v. Pleasuretime Dev. Corp., Ga. App., 239 S.E.2d 203, 95 B.L.J. 659.

Georgia (1977) Defendant-maker of a note claimed to have signed in a representative capacity where the word "President" appeared after his signature on the note but the name of the corporation he purported to represent did not appear. The trial court granted plaintiff-holder's motion for a directed verdict and refused to allow evidence for defendant. The appeals court held it was error to deny defendant an opportunity to establish his representative capacity. Plaintiff did not claim to be a holder in due course, so he was subject to all defenses. The court noted that it would have been better practice for defendant to have set out his defense in his original answer or to have amended the answer, but that he nonetheless should not be denied an opportunity to present his defense. Where a representative word appears on the face of the note, parol evidence is allowed to establish the understanding of the immediate parties as to the capacity in which the instrument was signed. U.C.C. § 3-403(2)(b). Lowry v. Lomire, Ga. App., 238 S.E.2d 594, 95 B.L.J. 659.

Georgia (1977) An attorney sued to recover on a promissory note executed by a corporation for legal services rendered. Defendant alleged there was no consideration for the note. Defendant admitted that legal services were rendered. The statement in the affidavit of defendant's president that the corporation received no consideration from plaintiff for the promissory note amounted to a mere conclusion. Further, no new consideration is necessary for a note given in payment of an antecedent obligation. Summary judgment for plaintiff affirmed. Healthdyne, Inc. v. Henry, Ga. App., 240 S.E.2d 259, 95 B.L.J. 662.

§1562.54. Article 4—Bank deposits and collections.

Illinois (1977) A bank acted in bad faith in misrepresenting the financial situation of one of its customers to the customer's creditor, plaintiff, who was also a customer of the bank. The bank was also liable for failure to return the three checks in question before the midnight deadline imposed by statute. Available Iron & Metal Co. v. First Nat'l Bank of Blue Island, 371 N.E.2d 1032, 95 B.L.J. 857.

Louisiana (1977) Six forged checks were cashed at plaintiff-food store, which deposited them for collection in a branch of defendant-bank. The checks were drawn on another branch of the same bank. The checks were not dishonored by the bank by midnight of the day following the date of receipt as required by law. U.C.C. § 4-212. They were dishonored from eight to fifteen days after receipt. The six checks had been forwarded on the day of receipt to the main branch of the bank, which is used as a central clearinghouse for all branches. The bank claimed that the midnight deadline was not applicable because each branch was deemed a separate bank under the statute. U.C.C. § 4-106. The court concluded that in such instances, Section 4-106 is not applicable. The bank was liable for the amount of the six forged checks. Circle Food, Inc. v. National Am. Bank of New Orleans, La. App., 352 So. 2d 327, 95 B.L.J. 565.

USURY

§1565. Transactions held not usurious.

New York (1977) Defendant made and delivered to Franklin National Bank a promissory note dated September 11, 1973. Thereafter, Franklin National was declared insolvent and plaintiff was appointed receiver. As receiver, plaintiff assigned all the receiver's right, title, and

interest in the September note to itself in its corporate capacity. Although the principal of the loan was paid, the interest on part of the balance was outstanding. On March 26, 1975, defendant made and delivered to plaintiff its promissory note for the unpaid interest on the September note. Although demand was made, no part of this note was paid. The court found that the March note, the subject of this action, was not usurious and that any claim of usury pertaining to the September note could not be asserted against plaintiff as holder of the March note. In addition, it was found that the September note was not usurious. Franklin National Bank was exempt from state usury statutes since the demand loan was for an amount exceeding $5,000 and was secured by negotiable instruments. N.Y. Banking Law § 108(3); N.Y. Gen. Obl. Law § 5-523. Summary judgment was granted to plaintiff, and defendant could not amend its answer to include the affirmative defense of usury. FDIC v. Paul Properties-Nutley, III, App. Div. 2d Dep't, 394 N.Y.S.2d 266, 95 B.L.J. 189.

§1589. Conflict of laws.

New York (1977) New Jersey law applied where two loans in question were made by a New Jersey resident who had been contacted by telephone by the borrower in New York; the funds were transferred from a New Jersey bank and the notes were received and were payable in New Jersey. According to New Jersey usury law, a lender may recover the amount actually lent, without interest or costs, where the interest is above the legal rate. 31 N.J. Stat. Ann. § 31:1-3. Since the loans here provided for a 10 percent interest rate, which is above the New Jersey legal rate, plaintiff could recover only the principal amount of each note. Devine v. Meyer Assoc., 450 N.Y.S.2d 19, 95 B.L.J. 857.

WAREHOUSE RECEIPTS

§1595. Rights of bona fide holder.

Georgia (1977) Plaintiff executed a promissory note in the amount of $55,000 with interest at 10 percent per annum secured by real estate. He sought to have the loan declared usurious because Georgia law sets a 9 percent interest ceiling on loans where real property is given as security. Ga. Code Ann. § 57-101. Defendant claimed it proceeded under authority of the National Housing Act. 12 U.S.C. § 1730e. That statute sets interest rates at not more than 5 percent in excess of the discount rate specified for Federal Reserve Banks on the date of execution. The court held that the interest rate was not usurious. The federal statute applies "notwithstanding any State constitution or statute, which is hereby preempted for the purposes of this section." 12 U.S.C. § 1730e(a). Green v. Decatur Fed. Sav. & Loan Ass'n, Ga. App., 238 S.E.2d 740, 95 B.L.J. 657.

WILLS

§1601. Testamentary capacity.

Arizona (1977) The court held that an elderly testator who showed signs of senility and deteriorating mental capabilities did not lack testamentary capacity and was able to execute a valid will. The court also found that testator's daughter, appellant herein, did not exercise undue influence upon her father in the making of the will or in the execution of certain deeds to real property. The burden is on contestants to prove by clear and convincing evidence that the will was procured by undue influence. The same standard applies to deeds of property. Appellant made no fraudulent representations to testator to induce the execution of the will. Nor was the will made in haste or concealed from other members of the family. The attorney who prepared the

will testified that appellant did not participate in any discussion of the terms of the will or in the making of the deeds. It was also held that no confidential relationship existed between testator and appellant. A parent-child relationship in and of itself does not constitute a confidential relationship for purposes of undue influence analysis. Evans v. Liston, Ariz. App., 568 P.2d 1116, 95 B.L.J. 570.

Georgia (1977) The proponent of a will called the subscribing witnesses to the will to testify, and this evidence was itself sufficient to make out a prima facie case of testamentary capacity of the testatrix. However, the testimony of the opponent's witnesses was sufficient to authorize the jury to conclude, as it did, that testatrix lacked sufficient mental capacity to make the will. There was a genuine conflict on the issue of capacity, and therefore a legitimate issue for the jury. The appellate court overturned the trial court's entry of judgment notwithstanding the verdict. The trial court's grant of the proponent's separate motion for a new trial, however, was affirmed. Since the law and facts of the case did not demand a verdict for either party, the grant of a new trial was not disturbed on appeal. Ga. Code Ann. § 81A-150. Helton v. Zellmer, 235 S.E.2d 35, 95 B.L.J. 384.

Oklahoma (1977) Decedent and his wife executed a mutual will in 1972. The wife predeceased decedent, and their mutual will was admitted to probate her estate. In 1975, after the wife's death, decedent executed a revocation of all former wills and codicils made by him during his lifetime. He never executed a new will. The will's proponent contended that decedent lacked testamentary capacity on the date of revocation and that the will was still in force and effect at the time of decedent's death. The will's contestants claimed that the revocation was valid. The court held that testator was mentally incompetent at the time he executed the revocation and that the will was properly admitted to probate. The rules which apply to testamentary capacity to make a will also apply to testamentary capacity to revoke a will. *In re* Estate of Bailess, Okla. App., 569 P.2d 543, 95 B.L.J. 573.

Texas (1977) Will devised most of testator's property to one of his two daughters and named her executrix. That daughter, appellant herein, secured testator's release from the hospital and brought him to his home. Soon after, she took him to an attorney's office where the will in question was executed. The court found that testator did not have sufficient mental capacity to understand the nature and extent of his property, to know the natural objects of his bounty, to collect in his mind the elements of the business to be transacted, and to hold those elements in his mind long enough to perceive their relation to each other and to form a reasonable judgment on them. Reding v. Eaton, Tex. Civ. App., 551 S.W.2d 491, 95 B.L.J. 381.

§1604. Signature and execution.

Connecticut (1977) Plaintiffs, decedent's heirs, appealed to the superior court from a decree of the probate court admitting the will to probate. After a trial in the superior court, the jury found in favor of plaintiffs by response to an interrogatory concerning due execution of the will. No exception had been taken to the court's charge pertaining to execution. The high court upheld the verdict. Due execution is a statutory issue, and the burden of proof is on the proponent of the will, defendant herein. In the instant case the burden was not met. D'Agostino v. Amarante, 375 A.2d 1013, 95 B.L.J. 479.

Mississippi (1977) Letters of administration had been granted to decedent's sister. Several months later, appellant of-

fered for probate a document purporting to be the will of decedent. The document was entirely typewritten, signed by decedent, and notarized. Decedent's sister, as administratrix, challenged the document as a will on the ground that it was neither wholly written and subscribed by the testator, nor attested to by two or more credible witnesses in the presence of decedent as required by law. Miss. Code Ann. § 91-5-1. The court agreed, holding that an attesting witness is one who signs his name as a witness to the will's execution and who is able to state, when called to prove the will, that the requisites of the statute were observed. Batchelor v. Powers, 348 So. 2d 776, 95 B.L.J. 376.

New York (1977) Will submitted for probate contained four pages. Testatrix and witnesses signed on page three, and page four was designated "Schedule A" and signed by testatrix but not by the witnesses. Article Four of the will made specific reference to "Schedule A—Annexed." The signatures on the third and fourth pages were the same, they bore the same date, and they were typed with the same typewriter. New York law requires that a will shall be signed at the end thereof by the testator and two witnesses. N.Y. Est., Powers & Trusts Code § 3-2.1 (McKinney 1967). The court admitted the will to probate, ruling that the reason for the requirement, prevention of fraud, should not be subverted by raising form above substance. The fourth page was clearly identified by specific reference in the will, and circumstances were present which excluded any reasonable possibility of chicanery or mistake. *In re* Will of Powell, Surr. Ct. Westchester County, 395 N.Y.S.2d 334, 95 B.L.J. 477.

§1604.4. Holographic will.

Louisiana (1977) Testatrix's husband brought a petition for probate of a holographic will. Testatrix's sister opposed probate, contending that the will had not been proved by the testimony of two credible witnesses, La. Code Civ. Pro. Ann. Art. 2903, and that is was a forgery. The sister filed a petition for possession seeking to be made administratrix of the estate. At the hearing, testatrix's husband testified that he was very familiar with his wife's handwriting. He identified the handwriting on various postcards and photographs as that of his wife, and stated unequivocally that the will was entirely written, dated, and signed in his wife's handwriting. Another witness, a young man whom testatrix had raised from infancy, testified that the writing on the postcards, photographs, and will was that of testatrix. A qualified handwriting expert also testified on behalf of the will. The testimony of the husband and expert was sufficient to satisfy the statutory requirement of proof by two credible witnesses. The will's opponent offered insufficient evidence of forgery. Currie v. Currie, La. App., 348 So. 2d 704, 95 B.L.J. 378.

§1605.5. Lost will.

Connecticut (1977) Plaintiffs, allegedly beneficiaries under a lost will, sued defendant-attorney, claiming that he was negligent and had broken an agreement with testatrix in that he did not produce the will of testatrix after her death. Defendant contended that plaintiffs lacked standing. The court agreed, holding that beneficiaries under a lost will cannot maintain an action against a person allegedly responsible for the loss of the will without alleging that they have previously instituted proceedings to have the lost will admitted to probate. Benedict v. Smith, 376 A.2d 774, 95 B.L.J. 473.

New York (1977) An attorney testified that he remembered the preparation and execution of decedent's will and the particular reason for his having the will pre-

pared. It was then his office practice to give a copy of the will to the testator and retain the original in his files. A fire in the attorney's office had destroyed all such files. The attorney identified a conformed copy of the will, and stated that it was a carbon copy of the original and that he was satisfied that the copy was an exact copy of the original will executed before him and the witness. The attorney's testimony was sufficient to overcome the presumption that the original will had been destroyed by decedent for the purpose of revoking it. Concerning due execution, the court concluded that a prima facie case was made out by the presence of an attestation clause as proof of the signatures of the testator and witnesses. *In re* Estate of Utegg, Surr. Ct., 396 N.Y.S.2d 992, 95 B.L.J. 193.

§1606. Revocation of will.

Alabama (1977) Will was admitted to probate where a contestant failed to prove that testatrix had revoked it by execution of a new will. To show execution of a subsequent will, the contestant had to prove that the subsequent will was in writing, signed by the testator, attested to by at least two witnesses and that the witnesses subscribed their names in the testator's presence. The contestant's only evidence was his testimony that the testatrix told him she had executed a new will and that he had seen it. Allan v. Allan, 353 So. 2d 1157, 95 B.L.J. 861.

Oklahoma (1977) Decedent and his wife executed a mutual will in 1972. The wife predeceased decedent, and their mutual will was admitted to probate her estate. In 1975, after the wife's death, decedent executed a revocation of all former wills and codicils made by him during his lifetime. He never executed a new will. The will's proponent contended that decedent lacked testamentary capacity on the date of revocation and that the will was still in force and effect at the time of decedent's death. The will's contestants claimed that the revocation was valid. The court held that testator was mentally incompetent at the time he executed the revocation and that the will was properly admitted to probate. The rules which apply to testamentary capacity to make a will also apply to testamentary capacity to revoke a will. *In re* Estate of Bailess, Okla. App., 569 P.2d 543, 95 B.L.J. 573.

§1607. Construction and validity of the will.

California (1977) A clause in testatrix's will disinherited "any person not mentioned herein." California law requires that if a testator wishes to disinherit his lineal descendants, it must appear on the face of the will that at the time of its making the testator had the person in mind and intentionally omitted to provide for him. Cal. Prob. § 90. The clause was held to be a general disinheritance clause expressly indicating an intent to disinherit, and successfully disinheriting testatrix's grandson. *In re* Estate of Gardner, Cal. App., 141 Cal. Rptr. 90, 95 B.L.J. 571.

Georgia (1977) Will devised to testator's niece and her husband certain land "to be owned and kept in their possession as long as they live," followed by a statement that the land had been in testator's family for 140 years and he did not wish it to be sold. Appellants petitioned for a construction of the will that the quoted language created a life estate only in the niece and her husband. The court found that testator intended the bulk of his estate to go to his niece and her husband and that their interest be a fee simple absolute. This interpretation is supported by testator's failure to indicate expressly who would take in the event his instructions were violated, and it avoids an intestacy, which is not favored in the construction of wills. Stanton v. Dickson, 239 S.E.2d 741, 95 B.L.J. 667.

Idaho (1977) Decedent's attorney had a typewritten draft of a will prepared. The draft copy was delivered to decedent and with various handwritten amendments was signed by him and placed in his desk drawer. The draft copy contained an attestation clause in rough form, which was not signed. The beneficiaries of this alleged will petitioned the court to accept it as a nuncupative will. The court held that decedent died intestate. Section 15-2-502 of the Idaho Code effectively repealed the nuncupative will provisions formerly in effect. *In re* Estate of Buffi, 564 P.2d 150, 95 B.L.J. 96.

Illinois (1977) Will devised to decedent's wife an undivided one-half interest in a farm. The remainder of the estate, including the rest of the farm, was placed in trust with plaintiff and his sister to act as trustees. The will further provided that if plaintiff desired to purchase the farm, he was to have an option to do so for six months following the death of decedent's wife. More than seven months after decedent's wife died, plaintiff filed a petition to have decedent's will construed to give him a special option to purchase the entire farm. The court dismissed the petition, holding that plaintiff's failure to act within the six-month period specified in the will was a fatal deficiency. *In re* Estate of Rosenbrock, Ill. App., 369 N.E.2d 396, 95 B.L.J. 665.

New Jersey (1977) Defendant, testator's sister, instituted incompetency proceedings against testator and was appointed his guardian. She served in that capacity until testator's death. Plaintiffs were other siblings of testator who sought to set aside his will, in which his entire estate was left to defendant, as well as his conveyance of his home to defendant. Both were executed after testator was adjudged incompetent. Defendant sought a hearing to prove her brother's testamentary capacity at the execution of the will. The court held that the statute is mandatory which provides that if a mental incompetent dies leaving no will except such as was executed after the commencement of proceedings that resulted in a judgment of incompetence, his property shall descend as in intestacy. N.J. Stat. Ann. § 3A:6-39. Defendant's claim that the statute merely set up a rebuttable presumption that the will was invalid was rejected. The court held further that testator had lacked the legal capacity to convey land. *In re* Estate of Bechtold, 376 A.2d 211, 95 B.L.J. 376.

New York (1977) Testatrix devised to each of her daughters a divided one-half interest in certain land with a house and garage. The eastern half of the property was devised to her daughter Mary and the western half to her daughter Grace. The premises consisted of a two-family house divided by a partition, a two-car garage wholly located on the eastern half of the property, and a driveway located on the western half. Testatrix's daughter Mary claimed exclusive ownership of the garage since it was located on the eastern portion of the property. The probate court found that Mary had lived in the eastern portion of the house for thirty-six years, while the western half had been rented. Mary had used half of the garage, while the tenants had used the other half. The court found it reasonable to assume that testatrix intended to continue this arrangement with respect to the garage. The appellate court held that the probate court had properly received extrinsic evidence as an aid in determining testatrix's intent. *In re* Estate of Biviano, App. Div. 3d Dep't, 394, N.Y.S.2d 309, 95 B.L.J. 194.

New York (1977) A will created a trust of the residuary estate and provided for the payment of an annuity of $12,000 per year to the decedent's sister, on whose death the remainder was to be paid to a named charity. The trust, as written in

the will, did not qualify as a charitable remainder annuity trust under the Internal Revenue Code because the annuity was less than the 5 percent payout required by the Code. 26 U.S.C. § 664(a)(1). Nor did it contain the governing instrument provisions required by the Treasury Regulations. Reg. § 1.664-2. The court reformed the will to create an annuity trust of the type authorized by these provisions. Decedent's sister, the annuitant, was permitted to execute a partial renunciation and disclaimer renouncing all rights she had in the amount of the net residuary estate that exceeded $240,000. The named charity received outright the excess over $240,000, and the gift qualified for the charitable deduction. In addition, the reduction of the principal of the trust to $240,000 allowed the $12,000 annuity to satisfy the 5 percent payout requirement. *In re* Estate of Webster, Surr. Ct. N.Y. County, 396 N.Y.S.2d 592, 95 B.L.J. 283.

New York (1977) A will provided a general bequest for decedent's widow of a fraction of the estate remaining after deduction of debts and funeral and administration expenses. Property owned by decedent and his wife as tenants by the entirety was not part of decedent's estate and could not be used in determining the amount of the widow's general bequest. Upon his death, decedent ceased to have any interest in the property held by the entirety with his wife. *In re* Estate of Whipple, 369 N.E.2d 9, 95 B.L.J. 478.

North Carolina (1977) Devisee was granted a house and lot for her lifetime to go to her estate in fee simple at her death. The court construed the will as granting devisee a power to appoint by will. It found that a devisee of a life interest with a testamentary power of disposition not coupled with any trust or beneficial interest to others may release or extinguish the right to exercise the power by delivering a deed to a third party. If the devisee executed a deed extinguishing her testamentary power of appointment, the Rule in Shelley's Case would operate to convert her life estate and the remainder in her heirs to a fee-simple estate in her. Devisee was able to convey good title to the property during her lifetime. *In re* Estate of Grady, N.C. App., 235 S.E.2d 425, 95 B.L.J. 194.

Oklahoma (1978) Where testator's will made it clear that his daughter was intentionally omitted as a beneficiary, the daughter was not entitled to share in the estate. The will left all of testator's property to his wife; it provided that testator fully understood who his heirs were and that if any of them should contest the validity of the will and establish that they are an heir then such heir is expressly bequeathed five dollars and no more. The will did not mention the daughter by name. The will's language was held to manifest a clear intent to disinherit the daughter. *In re* Estate of Chamberlin, 573 P.2d 694, 95 B.L.J. 861.

District of Columbia (1977) The residuary clause of testator's will left the remainder of his estate to four named individuals in equal parts. The will specified that if any of the four beneficiaries did not survive testator, his or her devise and bequest should lapse. One beneficiary predeceased testator. The co-executors contended that testator intended any share which lapsed to be divided equally among the other residuary legatees. They cited the antilapse statute which provides that any gift which is void or fails or is otherwise incapable of taking effect should pass under the residuary clause. D.C. Code § 18-308 (1973). Although the antilapse statute does apply to gifts in residuary clauses, it does not apply when vesting of a gift is conditioned on surviving the testator. In the absence of any ambiguity in the language of testator's will,

extrinsic evidence was inadmissible to prove what testator intended to happen to the lapsed share. Starkey v. District of Columbia, D.C. App., 377 A.2d 382, 95 B.L.J. 473.

§1607.4. Undue influence.

Alabama (1977) A will was contested by testator's son, who was beneficiary under a testamentary trust created under a prior will by testator's widow and by the two trustees under the prior will. The contestants alleged fraud and undue influence by testator's sister, proponent and sole beneficiary under the contested will. The court held that all the contestants had standing to sue. A will may be contested by any person interested therein or by any person who, if testator died intestate, would have been an heir or distributee of his estate. Ala. Code, Tit. 61, § 52. The contestant has the burden, in order to raise a presumption of undue influence, to prove a dominant confidential relationship and undue activity in the execution of the will by or for a favored beneficiary. Even assuming that a confidential relationship existed between testator and his sister, there was no evidence that she was the dominant party. Nor was it established that she actively procured the will. Pruitt v. Pruitt, 343 So. 2d 495, 95 B.L.J. 92.

Arizona (1977) The court held that elderly testator who showed signs of senility and deteriorating mental capabilities did not lack testamentary capacity and was able to execute a valid will. The court also found that testator's daughter, appellant herein, did not exercise undue influence upon her father in the making of the will or in the execution of certain deeds to real property. The burden is on the contestants to prove by clear and convincing evidence that the will was procured by undue influence. The same standard applies to deeds of property. Appellant made no fraudulent representations to testator to induce the execution of the will; nor was the will made in haste or concealed from other members of the family. The attorney who prepared the will testified that appellant did not participate in any discussion of the terms of the will or in the making of the deeds. It was also held that no confidential relationship existed between testator and appellant. A parent-child relationship in and of itself does not constitute a confidential relationship for purposes of undue influence analysis. Evans v. Liston, Ariz. App., 568 P.2d 1116, 95 B.L.J. 570.

§1608. Construction and validity of wills —provisions creating trusts.

Illinois (1977) Testator's son, plaintiff herein, was given use of a house rent-free for his lifetime under testator's will. Plaintiff had lived in the house under written leases for twenty-eight years. Plaintiff had continued to pay rent after the last lease had expired until his father's death. Plaintiff filed suit contesting the will. Defendants were the trustees, executors, and beneficiaries under the will. The lower court dismissed the action on the ground that plaintiff had accepted the benefits under the will by occupying the premises rent-free and could not therefore maintain an action contesting the validity of the will. The appellate court reversed. It held that an election had not been made because plaintiff remained on the premises under a written lease with a holdover provision. The signing of the consent to proof of the will and letters testamentary by plaintiff and the retention of counsel did not indicate any knowing acceptance of the benefits under the will. A party is entitled to full knowledge of the circumstances and of the situation value of the provisions made in a will and an election made in actual ignorance of material facts will not preclude the party from exercising the right anew upon obtaining full

information. *In re* Estate of MacLeish, Ill. App., 361 N.E.2d 618, 95 B.L.J. 93.

Missouri (1977) Plaintiff, as trustee under a will, sought a determination as to whether it had authority to sell its interest in certain real property, and in the event a negative decision were rendered, requested the court to order the will reformed so as to allow plaintiff to sell its interest in such property. The property produced minimal income, and the trustee was of the opinion that it would be in the best interest of the estate to sell the property and invest the proceeds in income-producing property. The court found that testatrix had not intended to grant trustee the power to sell the land in question. She had recognized that the gross income from the property might not be sufficient to pay taxes or assessments and insurance premiums imposed on the property by providing that the trustee could "encroach upon the principal of the remaining trust estate" to pay for these expenses. The court refused to allow plaintiff's attorney's fees and court costs to be paid from the trust fund. St. Louis Union Trust Co. v. Brug, Mo. App., 558 S.W.2d 375, 95 B.L.J. 574.

New York (1977) The court accepted the accounting of trustee beneficiary of a will where the will gave her the absolute power to invade the trust principal and no proof was adduced at the hearing to show that the trustee acted imprudently in the investment of trust assets or that she acted in an illegal or improper manner in her administration of the trust. *In re* Will of Warfield, Surr. Ct. Westchester County, 396 N.Y.S.2d 575, 95 B.L.J. 283.

Virginia (1977) Decedent's executor and trustee sought a construction of decedent's grandfather's will. The will created a trust and directed the trustees to pay the net income from the property to the grandfather's wife during her lifetime. After the wife's death and after the youngest child had reached the age of 30 years, the trustees were directed to divide the trust fund equally among the children then living and the descendants of any who may have died, per stirpes. The grandfather's widow and daughter were still living at the time of this action, but his son had died, survived by three sons as his sole heirs. One of these sons, the decedent herein, by his will bequeathed all of his estate in trust. The court held that decedent received a vested remainder interest in his grandfather's estate when decedent's father died. By using the words "then living" to describe his children who were to share in the distribution, the testator annexed a condition of survivorship. This condition, however, was annexed only to the gift to the grandfather's children and not to the gift to their descendants. Elliot v. Griffin, 237 S.E.2d 396, 95 B.L.J. 476.

§1609. Legacies.

New York (1977) A will bequeathed to petitioner $10,000 from which he was to pay "funeral expenses and other lawfull (*sic*) debts." The petitioner sought a determination as to whether he was liable for administration expenses. The court ruled that the necessary costs of administration should be borne by the residuary estate. Debts of a decedent have long been distinguished from funeral expenses and administration expenses. When a will is drafted by an attorney, words used in it are given the technical meaning they have acquired unless a different intent can clearly be gathered from a reading of the entire document. *In re* Will of Sperling, Surr. Ct. Queens County, 400 N.Y.S. 2d 279, 95 B.L.J. 669.

§1611. Disposition of property.

Georgia (1978) The court held that a statute providing that no person leaving a

wife or child or descendants of a child shall by will devise more than one-third of the estate to any charitable, religious, educational, or civil institution, to the exclusion of the wife or child and that a will containing such a devise must be executed at least ninety days before death, does not limit a testator's capacity to devise less than one-third of his estate to institutions, nor does it limit his capacity to devise more than one-third of his estate to institutions, except that such devise must be done more than ninety days before the testator's death. Baker v. Citizens & So. Nat'l Bank, 242 S.E.2d 39, 95 B.L.J. 861.

Illinois (1977) Plaintiff-bank brought an action to construe a will to determine the portion of the income of testamentary trust that should be distributed to defendant-Diane Hankins, daughter of testator. Diane and her sister, an incompetent, were lifetime beneficiaries of the trust. The incompetent daughter was to receive 50 percent of the annual income. From the balance of the net distributable income, Diane was to be paid "at least annually 30 percent of said income." The remaining 20 percent of the income was to be used to reduce any mortgage indebtedness and to meet any required principal payments. Defendant claimed that if 20 percent of the income was not needed for the above purposes, the balance should be distributed to her and not accumulated. The court held that testator did not intend for the 20 percent of the income to be accumulated. Long-time accumulations of income are not favored in the law. The court specifically rejected Diane's argument that decedent intended an annual distribution to her of at least 30 percent, but more if other funds were available for her from the 20 percent. The court will not supply a provision to a will to overcome an omission and prevent intestacy. Finding no provision in the trust for disposition of the unspent portion of the 20 percent of the income, the court ruled that it passed by intestacy to the two daughters in equal shares. Corn Belt Bank v. Hankins, 365 N.E.2d 1114, 95 B.L.J. 379.

Illinois (1978) Language in a will, stating that "all of the rest and residue of monies remaining after payment of the aforementioned legacies" should be divided among three beneficiaries, was held to devise testator's real estate as well as her money. In its broad sense, "monies" means wealth, the representative of commodities of all kinds. It is popularly used as equivalent to property, and when the intention of the testatrix is clear, it may include all kinds of property, real and personal. *In re* Estate of Breckenridge, 371 N.E.2d 1286, 95 B.L.J. 862.

New York (1977) A widow sought to assert her right of election against her husband's estate. A court had granted a decree of separation to the husband on the ground of abandonment. Thereafter, the parties reconciled and lived together for another seven years. During that time the widow commenced a proceeding for an order revoking the judgment of separation on the ground that the parties had reconciled. The husband filed an affidavit in opposition and the application was denied. The court in the instant proceeding held that the widow was barred from asserting her right of election. The only method of terminating a decree of separation is by court order after a joint application of the parties accompanied by satisfactory evidence of their reconciliation. *In re* Will of Granchelli, Surr. Ct. Monroe County, 393 N.Y.S.2d 894, 95 B.L.J. 95.

New York (1977) A will created a marital-deduction trust with a power of appointment. The wife could "appoint by her deed delivered by her in her lifetime to my said trustee." The wife did not exer-

cise the power by deed during her lifetime. She did, however, make certain charitable bequests by a residuary clause in her will. The court found that the testator clearly restricted the exercise of the power of appointment to an exercise by deed during the lifetime of the donee. It also held that the donor had explicitly excluded the exercise of the power by will. *In re* Estate of Beckwith, App. Div. 3d Dep't, 395 N.Y.S.2d 499, 95 B.L.J. 195.

Texas (1977) Where the judge in a divorce action had separated the issue of property division from the issue of divorce and rendered a decision on the latter issue only after the wife's death, no final judgment had been entered, and the husband was the surviving spouse and an "interested party" entitled to contest the wife's will. Garrison v. Texas Commerce Bank, Tex. Civ. App., 560 S.W.2d 451, 95 B.L.J. 671.

Utah (1977) Testator's will provided an option for his six sons by a previous marriage to purchase his real property. The option was timely exercised, and the sons moved the court to confirm the sale. The widow objected to the sale. Utah law provides that one-third of all estates in real property possessed by a husband at any time during the marriage, to which the wife has made no relinquishment of her rights, shall be set apart as the wife's property in fee simple if she survives him. Utah Code Ann. § 74-4-3. Another section states that when a sale is made and confirmed after due notice to the widow, the conveyance also passes her statutory interest in the property as survivor. Utah Code Ann. § 75-10-17. The court held that this section did not amend or abridge the widow's right to her statutory interest. It merely permitted a sale, with her consent, without the necessity of her executing a deed. The court held further that the allowance of a distributive share only for widows is not a discriminatory classification. *In re* Estate of Baer, 562 P.2d 614, 95 B.L.J. 94.

§1613.4. Adopted children.

New York (1977) A will established a trust for testator's "children." Testator's son died in 1968 survived by three adopted children. One of the adopted children sought permission to intervene in the construction proceeding to prove that she was the nonmarital child of testator's son. New York law provides that an illegitimate child and his issue inherit from the father if a court has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted within two years from the birth of the child. N.Y. Est., Powers & Trusts Law § 4-1.2. The court held that the statute applies to inheritance rights of nonmarital children and barred the intervention. Furthermore the will was executed prior to the time the words "issue," "children," and the like were deemed to include nonmarital children. Estate of Leventritt, Surr. Ct. N.Y. County, 400 N.Y.S.2d 95 B.L.J. 670.

§1613.5. Rights of designated heirs.

Alabama (1977) A husband and wife executed a joint will which provided that the residue of their estates be placed in trust to pay two named charities $100 each year. The testators had no children and the will made no provision for their other heirs. Plaintiffs, the heirs, claimed that the trust was invalid and that the trust property should descend to them. The charities claimed that in the event of surplus funds over $100 each year, the entire net income of the trust should be divided between them. The court agreed with the charities. It is presumed that a testator intended to dispose of his entire estate and did not intend to die intestate as to any portion of his property. Crippled Children's Found. v. Cunningham, 346 So. 2d 409, 95 B.L.J. 383.

§1613.8. Illegitimate children.

South Carolina (1978) The court held that a statute providing that if any person – having a wife or lawful children of his own who are living – shall beget a bastard child, such bastard shall not receive any more than one-fourth of that person's estate, was not applicable so as to limit a devise to an illegitimate child born prior to testator's marriage and prior to the time when testator had lawful children living. Williford v. Downs, 240 S.E.2d 654, 95 B.L.J. 862.

§1617. Verbal agreement to make bequest.

Georgia (1977) Decedent had three foster children, two of whom are plaintiff and defendant herein. Decedent's will provided specific monetary legacies for plaintiff and his foster brother. Plaintiff claimed that on his twenty-first birthday he and decedent made an oral contract whereby decedent promised plaintiff a one-third undivided interest in all of his estate for which plaintiff agreed to stay on decedent's farm and work for him. Various witnesses testified that they saw plaintiff working on the farm, and decedent's sister-in-law testified that decedent and his wife spoke to her of the agreement. The court concluded that the evidence was sufficient to support the jury's verdict for plaintiff. Brown v. Newkirk, 238 S.E.2d 352, 95 B.L.J. 665.

New York (1977) Plaintiff claimed that decedent had promised he would "take care of" her. The court held that plaintiff was not entitled to compensation from decedent's estate for housekeeping chores rendered by her. The words "'take care of" in the context of this record were too vague to spell out a meaningful promise. An enforceable agreement to compensate plaintiff by bequest would be required to be in writing. N.Y. Est., Powers & Trusts Law § 13-2.1(a)(2). Dombrowski v. Sokers, 393 N.Y.S.2d 706, 95 B.L.J. 96.

§1617.6. Practice and procedure.

Georgia (1978) The dead man's statute did not bar an executrix, who was also a beneficiary under the will, from testifying as to the facts and circumstances surrounding the preparation and execution of the will in a will contest. Where a person nominated as executrix in a will becomes its proponent by filing a petition to probate the will, she is, at that moment, just a proponent and is not the personal representative of the decedent within the meaning of the dead man's statute until the will is admitted to probate. Therefore, it was not error to allow the proponent's testimony as to the facts and circumstances surrounding the preparation and execution of the will, including the signing thereof by testator and the witnesses. Lightsey v. Strickland, 242 S.E.2d 23, 95 B.L.J. 862.

Kentucky (1977) Plaintiff-widow brought this action to attack the validity of her husband's will. Plaintiff moved the court to set aside the order of probate or, in the alternative, to allow her to file a renunciation. Ky. Rev. Stat. § 392.080. The court held that the renunciation was filed more than twelve months after probate of the will, making it ineffective and invalid. If a widow fails to renounce her husband's will she must take the estate given by the will. A widow may not appeal from an order probating her husband's will. If she does not approve of its provisions, the exclusive remedy is timely renunciation. Harlow v. Harlow, 551 S.W.2d 230, 95 B.L.J. 381.

New York (1977) Executors named in decedent's first will were authorized to file objections to probate of a second will in which they were not named as executors. Any person whose interest in property or in testator's estate would be adversely af-

fected by the admission of a will to probate may file objections to probate of the will. An executor is not a person interested in the estate in the usual meaning of the phrase. Executors, however, have the duty of supporting the will which names them and may object to other testamentary documents. A limit on this doctrine is that good cause must be shown before a surrogate will permit an executor to oppose a later will merely because commissions will be lost to the objectant-executor. Surr. Ct. Proc. Act § 1410. *In re* Estate of Silverman, Surr. Ct. N.Y. County, 397 N.Y.S.2d 319, 95 B.L.J. 288.

North Carolina (1977) Decedent's widow filed a dissent from his will which the executor moved to dismiss. The executor claimed that although the dissent was filed within the six-month statutory period after letters testamentary were issued, a widow is not entitled to dissent from the will of her deceased husband unless the estate and property passing to her outside the will have been appraised. N.C. Gen. Stat. § 30.1(c). Since more than six months had expired before the order of appraisal was entered, the executor argued that it was too late for the widow to dissent from the will. The court held that as long as the dissent was filed within six months after the issuance of letters testamentary, or extended pursuant to the Code, it was timely regardless of whether the appraisal had been conducted. N.C. Gen. Stat. § 30.2(a). *In re* Estate of Cox, N.C. App., 233 S.E.2d 926, 95 B.L.J. 285.

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